











*David Dudley Field*  
SPEECHES, ARGUMENTS,

AND

MISCELLANEOUS PAPERS

OF

DAVID DUDLEY FIELD.

EDITED BY  
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VOLUME III.

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# INTRODUCTION

DAVID DUDLEY FIELD

David Dudley Field was born in 1805 in Connecticut and died in New York City in 1894, having achieved in his lifetime the honor of being known as "The Father of United States legal reform."

He spent his whole life campaigning to bring about codification of common-law procedure in New York State. While the codification was never completely adopted in New York, the codes that he worked on were extensively adopted in many other States and other countries. His arguments for codifying common-law procedure were published in a pamphlet entitled The Reorganization of the Judiciary. This pamphlet was instrumental in persuading the New York Constitutional Convention of 1847 to favorably consider a codification of the law.

In an 1894 article written on the occasion of Field's death, the author admiringly stated that "his work will never be forgotten because it forms a conspicuous part of the progress of man himself toward that intelligent regulation of life which is the object of all law." The author goes on to say that "the admirable qualifications of Mr. Field for the great tasks which he accomplished would not have been complete without his advanced conception of the law itself. He was not a 'case lawyer'. He appeared to survey law in the direct relation which the whole and each part bears to public welfare." 2.

Roy M. Mersky  
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1. Austin Abbott, "The Work of David Dudley Field," Review of Reviews, Vol. 9, no. 5, May 1894, p. 550.
2. Ibid.

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# ADDRESSES AND PAPERS.

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## THE POLITICAL QUESTIONS OF 1844 TO 1848.

Though always a Democrat in principle, and generally acting with the Democratic party, Mr. Field was always an adversary of slavery. As early as April, 1844, he addressed a public meeting held at the Broadway Tabernacle to oppose the ratification of a treaty for the annexation of Texas; and not long afterward he signed a circular, which was also signed by George P. Barker, William C. Bryant, John W. Edmonds, Theodore Sedgwick, Thomas W. Tucker, and Isaac Townsend, inviting prominent Democrats of New York to join in a published letter declaring their purpose to support the nominations of Polk and Dallas, but rejecting the resolution respecting Texas. The joint letter was afterward prepared by Mr. Field, and published in the "Evening Post." A sketch of the speech at the Tabernacle was published in the newspapers of the time as follows:

FELLOW-CITIZENS: The President has sent to the Senate a treaty to annex to the territories of this Union a tract of country six times as large as the State of New York—a country which till lately was a part of the neighboring and friendly Republic of Mexico, and which even now is engaged in open war for its independent existence. This treaty has been negotiated with a suddenness, a secrecy, and haste, unparalleled in our annals—a suddenness, secrecy, and haste, which have no excuse in the nature of the act itself or in the circumstances of the country. We are in profound peace with all the world, and tranquil at home. What, then, can justify the President in entering upon and consummating, so far as depends on him, a treaty of such importance, almost before the country was aware it was contemplated? This annexation was offered to the Administration six or seven years ago, and rejected on grounds in which the whole country seemed to

acquiesce. We were, therefore, unprepared for this movement, till it came upon us like thunder in a clear sky. But I trust we have, nevertheless, warning enough to prepare for the storm. The President was not elected with reference to any such question, nor was the Senate, nor the House of Representatives. It is of all questions one in which the people should be consulted, and their will ascertained beforehand. We appeal from the President to the Senate, from the Senate to the States of the Union, from the States to the sovereign people. If they determine that this measure shall be accomplished, let it be; if they do not, let no secret cabal, no set of men in power, effect it. This question presents itself under a double aspect. It concerns our foreign relations and our domestic relations. I beg leave to call your attention to the first of these, and, if you are not already satisfied, I trust I shall be able to satisfy you that this is an act of bad faith, whether we consider our connection with the revolt of Texas, or the treaties now in force with Mexico. What is the history of this revolt?

Admit that the cause of quarrel between Texas and Mexico was just; yet the struggle was one in which we had no right to interfere; and, if we had followed the advice of the fathers of our country, we should not have interfered.

How was the revolution accomplished and made successful? By aid from this country; without aid from us, Texan independence could not have been established. It was well known that bands of hunters were organized in the Western States, to hunt in Texas, though there was nothing for them to hunt but Mexican soldiers. The aid our people sent them in men, in money, in munitions of war, accomplished the revolution. Mexico complained, and how was she answered by our Government? The Government said, We mean in good faith to fulfill our treaty stipulations, but it is impossible to prevent our men from going over our immense frontier; we can not maintain a cordon of troops for a thousand miles, in an uninhabited country; but we will prevent all aid from this country as far as we can.

That answer absolved the Government; but, if it were not able to prevent the wrong which our citizens perpetrated, let it not profit by it. Let us not proclaim our weakness as our

excuse, and then take advantage of the spoliation which our weakness permitted. The state of the case is simply this: Mexico has been despoiled of one of her finest provinces; the spoilers went out from among you, because you could not prevent them. Then take not back to your bosom the spoilers and the spoil. If you receive them, the whole world will pronounce you faithless.

Then, again, how do we stand with respect to our treaties with Mexico? We have a treaty, in which the high contracting parties bind themselves to inviolable peace and sincere friendship. Is it friendship to take her revolted provinces; is it peace to join her enemies in their war with her? The annexation of Texas is war with Mexico; every writer on the laws of nations will tell you so. And we have the authority of our venerable President, that it is not merely the provocative of war, but war itself. War, moreover, declared by the President and Senate, when the Constitution confided the war-making power to Congress. Consider what must follow such an act. You extend your frontier from the Sabine to the Rio Grande. Your troops must occupy the fortresses of Texas. Your troops instead of Texan troops must defend them against Mexico. Are you prepared for war? If you are, in the name of justice, in the name of honor, let it be fairly and manfully waged! I am for war, too, when necessary, in defense of the rights and liberties of our country. But I am not for an aggressive war against a weak and unoffending neighbor. The people of this republic are the best judges of that question; let them decide it. If we are to have war, let it be such a war as our forefathers waged, in self-defense, for the maintenance of our rights and honor.

Fellow-citizens: Of all the sophistries ever brought forward to delude the people, the weakest is this word reannexation; as if we had, as a matter of course, a right to take back what once belonged to us, without regard to our engagements? Are you prepared to take this country in the face of existing treaties? We have treaties which run the boundaries between that country and ours. What authority, then, can proclaim that that country is ours? None, but one willing to deny the validity of those treaties, can assert that we have any right to that terri-

tory. There is not, for this act of rapacity, in the whole history of the world a single precedent but one, and that is the partition of Poland. Mr. Senator Walker, I had almost said, was a plagiarist. The argument, almost the very language, is taken from the manifestoes of the sovereigns in their act of rapacity and perfidy. They, indeed, use the word *reassume* for *re-annex*, that is the difference. Here is the language of Maria Theresa, the Empress-Queen of Hungary, in September, 1772: "Having maturely considered the present state of Poland, and determined, in concert with the Emperor of Russia and the King of Prussia, that we and our said allies shall reassume certain provinces and districts of the said kingdom of Poland, to us of old belonging, we have thought proper to command our troops to occupy this tract of country."

The argument in part was this: In 1412 the thirteen towns of Zips had been mortgaged by the King of Hungary to the King of Poland. Poland had had an uninterrupted possession of three hundred and sixty years.

But now it was asserted that the cession was void, because the kings of Hungary were prohibited by the constitution, as expressed in the coronation oath, from alienating any of their dominions. Now, mark the sincerity of this declaration. The clauses in the coronation oath, in which the queen founded her claims, did not exist for more than a hundred years after the mortgage!

There is another consideration I pray you not to forget, and that is, that this act will destroy the moral influence of America and of her freedom on the world. The great principle on which we founded our independence and our government was *right against power*. That principle of right proved mightier than the sword of England. We proclaimed right; we enthroned it. We fought under it; and we conquered under it. Will you reverse all this, and throw down the only power in the world that can cope with thrones and dynasties?

Remember the proud moment when Congress, by acclamation, recognized the independence of the new republics of our hemisphere. Then we took them by the hand; they followed our example. We thought we had arrived at the period foretold of our country—



“ When younger commonwealths for aid  
Shall cling around her ample robe,  
And from her frown shall shrink afraid  
The crowned oppressors of the globe.”

But the contrast is too painful, and I will not pursue it.

We are told, as a reason for assenting to this measure of injustice, that, if we do not annex Texas, England will. Let us look at this for a moment. Is it probable, nay, even possible, that England will do this? She could not, she dare not hold Texas as a slaveholding state for a single moment. The people of England would not endure it.

We all know that emancipation in the English West Indies was not the willing act of the English Government. It was forced on them by the spirit of the English people. That spirit has not lost its force. No English ministry could stand a single session which should hold a slaveholding province. But take the other alternative. Suppose England should take Texas; we shall have done our duty; anything is better than dishonor. Have we not enough territory to satisfy the most grasping ambition? Does not our dominion extend from the Atlantic to the Pacific Ocean, over twenty parallels of latitude, giving us the best of American soil? The old flag of our fathers was never yet sullied by dishonor. It never yet was lowered in fair and equal fight. It floats in glory yet. Let it float on! Stand by it to the last. Wherever it floats, either on the deck of the ship, or on the land; on the mountain or the plain; on the prairies of the West or on the Father of Rivers—it is the flag of freemen who may not see it dishonored. In the name of Heaven! if that invocation be not too solemn for the occasion; do no act which can tarnish its olden glory!

Three years later, that is, in October, 1847, a Democratic State Convention met in Syracuse, New York, where was struck the first blow against slavery ever given in such a convention. There, when the resolutions proposed by the committee on resolutions had been read, Mr. Field moved an amendment by adding two resolutions which had been previously read. The chair decided Mr. Field out of order, because, as he said, the resolutions had been disposed of. Mr. Field claimed his right to the floor, accepted as a substitute from Mr. Doolittle, of Wyoming, the following resolution, and moved it as an amendment to the report:

*Resolved*, That while the Democracy of New York, represented in this convention, will faithfully adhere to all the compromises of the Constitution, and main-

tain all the reserved rights of the States, they declare, since the crisis has arrived when the question must be met, their uncompromising hostility to the extension of slavery into territory now free (which may be hereafter acquired), by any action of the Government of the United States.

The resolution itself was kept for years at the head of the "Albany Atlas," and was known as "The Corner-Stone."

Mr. Field then made a speech, of which the following is a sketch, after which the resolution was, by vote of the convention, laid on the table.

I have been reminded many times, during the progress of this convention, of the words of Macbeth, as most applicable to the situation of the majority here, and I doubt not they have often said to themselves when they thought what they were to do :

"If it were done, when 'tis done, then 'twere well  
It were done quickly."

They forget, perhaps, the procession which afterward passed before his bewildered eyes and seared his eyeballs, of the long line of rulers of a different lineage, no son of his succeeding.

Mr. President: The resolution which I now offer, by way of amendment to the resolutions of the committee, asserts that the crisis has arrived when the question it embraces must be met. Sir, that crisis has arrived, as I think I can show; and I think I can show, further, that there never was one in our history more demanding the agreement of all free hearts and free hands. Our Government is devoting all its energies to "conquer" a treaty of peace, stipulating for the acquisition of a vast territory, in many parts of a rich and fertile soil, capable of containing millions of people, with harbors on the Pacific likely to become the marts of a great commerce with our own continent and all the East. This treaty of peace may be already made, and on its way to us, as fast as steam and winds can bear it.

It is the design of a large party among us, comprising statesmen having the confidence of the Democratic party, statesmen elevated in their stations now, and who hope soon to claim our suffrage for stations still more elevated, to give up that territory, or all that lies south of 36° 30', to slavery; that is, they propose to us, freemen of the North, to join in devoting soil now free to domestic slavery. I submit to you,

then, whether this is a time to be idle, and whether they who counsel you to remain silent, or to wait for a more convenient season, do not intend to deceive and betray you.

I maintain these four propositions—*that we must act ; that this is the time to act ; that the course of action is plain ;* and, further, that the slave party, of which I have just spoken, *d demands of us more than has yet been yielded by Northern Democrats, and a compromise such as no Congress has ever yet made.*

We must act, because inaction delivers the territory to inevitable slavery, established by the power, in the name, and under the authority of the Union. If we fold our arms and stand idle, thinking it none of our business, or waiting for a more convenient opportunity, these vast regions, where now not a slave is found, will be covered with slaves. Whatever view we take of the subject, the result is the same. Let us consider it for a moment in its different points of view.

If we make no treaty, but content ourselves with an armed occupation of the country, will not slaveholders, with their slaves, follow in the track of our armies, and hold their slaves by the law of force, with the sanction of our military commanders, under instructions from the capitol ? Are there not slaveholders on the ground at this moment, gone there with their slaves, and exercising, under the protection of our arms, the same rights over them that they exercised in their homes ? If this war lasts five years longer, under the charge of a President and Cabinet in the interest of slavery, that institution will be practically established in the country we occupy, unless we take measures to prevent it. Is not this of itself motive enough for action ?

If we make a treaty, giving us territory, what are the consequences ? If it were made to-night, and to-morrow's sun were to rise upon the land as an American province, what would be its condition ? When the sun went down, not a slave, legally held, pressed its valleys or trod its mountains. When the sun rises, is freedom banished and slavery established ? Did the treaty of acquisition change the soil from free to slave ? I maintain that it did not. I am confident that the mere acquisition by us makes no change in the rights

of person or property in the country acquired. The right of conquest, according to the law of nations, does not of itself add to or take from the personal rights of the inhabitants. But while I am thus confident, I find a large party who maintain directly the opposite opinion. They hold, if I understand them, that the mere possession of the country by the Union, or, as they express it, by the "States united," gives to the inhabitants of each State the right to emigrate thither with their property, and therefore to settle there with their slaves. However unsound we may think this doctrine ourselves, we can not shut our eyes to the fact that a great party at the South, and perhaps some at the North, also, hold it for true. Possibly the President may be of the same opinion. His Cabinet perhaps agree with him. Will not the judges whom he will appoint for the new Territory agree with him also? Is it wise, then, to take no precautions against such a construction? Is it safe to do so? Ought we not rather to act the manly part of declaring our determination not to be parties to any acquisition having such consequences? Shall not our language be so explicit as to exclude this conclusion? Do not candor and duty require of us to make it an express condition of the acquisition that such an act shall not be held to legalize slavery on its soil?

Suppose, however, it be conceded by all parties, what I conceive to be the true rule, that when we take the Territory, we take it with its existing laws, except so far as they are changed by the express provisions of the act of cession, and if not thus changed, that they remain, liable to be altered only by subsequent legislation, what, then, is our duty? Clearly, to see in the first place, that nothing is inserted in the treaty of cession, which by any intendment will legalize slavery; and, in the second place, to provide against subsequent legislation that may legalize it, while it remains under our control.

Imagine the Territory once acquired, without any sanction of slavery, express or implied, in the act of cession, what next will happen? We must govern it; and, to govern it, we must either legislate for it ourselves, or provide it with a Legislature. In either case, the responsibility of the legislation rests with us.



That we must act is manifest, or leave the new Territory without legislation. Suppose we take the Territory to-day, with its present laws. How and by whom are further laws to be made? By Congress or by a territorial government. The way in which it will probably be managed is this: either the treaty of peace will provide that, until otherwise directed by Congress, the Territory shall be governed by a Governor and Council, or Governor and judges, appointed by the President and Senate, or an act will be passed by Congress for organizing a territorial government, and vesting the legislative power in a Governor and judges, to be appointed by the President and Senate, as was done in respect of the Territory Northwest of the Ohio. Suppose either of these to happen, and a Governor and judges to be appointed by the present President and Senate. Who are likely to be appointed? Men from the free States, who will pass no law for the establishment of slavery; or slaveholders, who will establish slavery in those parts of the Territory which the South may wish for it? I have no doubt that slavery will be legalized in parts of the country, if not the whole of it, within the first six months, if it be not prohibited by Congress.

We must act, therefore, and act now. The whole power of this Union is exerted with incessant vigor to extort the cession of territory without delay. Any moment may bring it, and that moment may decide the fate of the Territory, whether it is to be free or slave. The President and Senate are our servants; their acts are our acts; and it is our right and our duty to instruct them, and to prevent this great wrong by timely action. If slavery is planted on that soil, it is put there by our own act. No slave can go there, and be kept in his chains, but through the interference of the Federal Government. And yet there are persons who pretend that for *us* to interfere is unconstitutional!

What notions these persons may entertain of the Constitution of the country, I am at a loss to understand. According to the doctrine of that "straitest sect" in which I am an humble disciple, the Constitution is to be construed strictly; it is to be held just as our forefathers made it; nothing is to be taken from it, and nothing added to it. Now, is there any-

thing in it which requires the Union to conquer, annex, or possess itself of any foreign territory? Is there anything which compels the freemen of the North to bear a part in any such proceeding? Nothing. Then, if they do consent to it, or bear a part in it, may they not annex any condition they please to such, their own voluntary act or consent? Certainly they may. Therefore, not being obliged to take more territory, they may constitutionally and rightfully say, We will take it, but only on condition that its institutions shall not be so changed under our rule as to dishonor us, and bring scandal on the names of republicanism and freedom.

But if the Territory were already acquired, without condition, the Constitution requires Congress to make "all needful rules and regulations respecting" it. Does anybody dispute that? What are "needful rules and regulations"? The most needful and the very first to be established are those which regulate the personal rights of the settlers. Without them the country would not be habitable; brute force would bear sway; the slave could turn upon his master and reduce him to servitude, if he were the stronger of the two. Lawlessness alone would be in the ascendant. You must then establish, define, and enforce personal rights, in whatever territory you have, either directly by the Federal Government, or indirectly by a territorial government, established by the Federal. Since, then, you must define the personal rights of the inhabitants, and declare what relations one person shall bear to another, the pretense that it is unconstitutional to provide that the relation of man to man shall be that of freeman to freeman, while on the contrary it is constitutional to provide that it shall be that of slave to master, is the shallowest pretense that ever entered the brain of man. It is just as constitutional to provide by law that a man shall not be held as a slave, as that a child shall not be subject to his father after majority. I hope, therefore, that whatever other objections we hear, we shall hear no more the preposterous one that to oppose the extension of slavery into free territory by the action of the Federal Government is unconstitutional.

Indeed, sir, the question is forced upon us by those who propose to take affirmative action on the part of the Govern-  
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ment. Our position is entirely one of resistance to aggressive slavery. So long as slavery remains at home, content with itself, and does not use the arm of the Government for its own purposes, we have nothing to say. But the fanatics of the South (I use this term because I do not wish to confound them with the great mass of our Southern brethren) and their allies at the North will not let the question alone. They insist upon using us as their instruments to propagate slavery.

Within thirty days have we not seen two high functionaries of the United States, the Vice-President and Secretary of State, one openly proclaiming that he is for giving up a part of soil now free, to the dominion of slavery, and the other hinting at more? These men, your public servants now, will probably be candidates for your suffrages the next year. And yet there are men among us, so blind or so insincere, as to tell us that we ought to wait for some future time, and not discuss the subject now.

If, then, we must act, and act now, how shall we act? There can be but one answer, and that is, ACCORDING TO OUR PRINCIPLES. We are not friends of slavery. We do not believe it to be a wise or good institution. We will do nothing to establish or to extend it. We will not, indeed, infringe a single reserved right of the States. We will adhere to all the compromises of our forefathers. We will not violate or neglect a single article of the compact. But there we rest. We will not enter into any new compact for the spread of slavery. We will have neither part nor lot in its extension. New York has abolished the slavery which the British crown thrust upon her. She will never throw upon another soil that which she has cast from her own. The great principles of equality and freedom, which lie at the foundation of our political system, the consciences of our people, the judgment of Christendom, the voice of humanity, and the law of God, forbid it.

It has been said that the territory acquired by the Union is the property of the Union, and, therefore, that no portion of the Union can be rightfully excluded from it. Let this be granted, and what does it prove? Does it prove that the Territory must be governed according to the views of every State of the Union? That is impossible, if, as in this case, their



views are different. What will you do, then? The majority must decide.

Let us look into this pretended impartiality a little further, and see to what absurdities it will lead us. If the objection means anything, it means that the institutions of the Territory shall conform to the institutions of all the States. If, for example, some of the States were to establish a law of debtor and creditor so severe that the debtor should be held in servitude to his creditor, might these States demand that a similar law should be established in the new Territory, against the wishes of those States whose codes were more humane? If polygamy were permitted in some of our States, would that also have to be permitted in the Territory? Must the States, which abhor and punish it, give up their objections and sanction it, because other States have no scruples on the subject? Suppose, by the laws of some of the States, the paternal power were increased to that extent that the father should have, as was the case in Rome, the power of life or death over his children, should such a power be engrafted upon the laws of the Territory, in deference to the institutions of such States? Cases might be multiplied indefinitely to show how untenable is the position assumed.

But, if we were to abandon all these points, and assume even that the territory acquired by the United States ought to be parceled out among the several States, so that each may establish in its own part its own institutions, then the question would come to this—shall we, who dislike slavery, and will have nothing to do with it, shall we unite in the conquest or acquisition of territory, that a part of it may be slave, though all the rest of it be free? In other words, will the people of New York help to conquer or acquire any soil for slavery, at any price or on any condition? They will never do it—no, never! They would not take three quarters of the continent, as the price of one quarter consigned to servitude.

The next point to which I call your attention is this: that, among all the compromises in legislation that have been made on the subject of slavery, none of them comes up to this which is now proposed to us, that is, to divide the territory into free

and slave, by the line of  $36^{\circ} 30'$ . In the case of Louisiana, the treaty of acquisition provided for the preservation, to the inhabitants of that country, of all their rights of property. They then had slaves. Their right to them was guaranteed by the treaty. Though there were not many inhabitants, these could carry their slaves into any part of Louisiana, and keep them there, so that slavery really existed in all that province, from the Gulf of Mexico to the latitude of  $49^{\circ}$ , and from the Mississippi to the Rocky Mountains. The Missouri Compromise, therefore, not only *did not devote free soil to slavery, but really excluded slavery from a part of the territory where it then existed by law*. In the case of Texas, there was slavery already. We did not establish slavery there, but we received it with its slavery. We did not devote an inch of free soil to slavery. Neither of those cases is therefore a precedent for this. If we compromise upon soil now free, we do more than has ever yet been done. We are now asked to make a new compact with the South, to transmute a free soil into slave—to conquer territory, not for freedom and for free labor, but for slavery and the labor of slaves. Can there be a doubt how we should act, and how the Northern Democrats will act? The question is thus presented to you. Cover it up as this slave party will; deceive about it as they may; to this complexion it must come at last, that they ask you to plant slavery in soil now free, by your own voluntary act. That I know the North will not do.

You will, I am fain to hope, agree with me that there is but one course for us to pursue. Our honor, our duty, the voice of our constituents, demand this much from us. Whatever may happen, however much men may threaten, let us hold fast by our greatest principles, the principles of equality and freedom. Let us resolve, without delay and without division, that whatever conquests we may make, wherever our arms may be carried, wherever our standard may be planted, it shall not turn the soil into the domain of slavery. You may extend the area of freedom as wide as the continent; you may bear our victorious standard to the Isthmus of Darien, or plant it on the highest peak of the Polynesian Islands, but the soil on which it advances must be free—ay, as free

as the untrammelled soil on which we stand ! We can glory in conquest only—

“ With freedom’s soil beneath our feet,  
And freedom’s banner streaming o’er us.”

The next year (1848) the National Democratic Convention met in Baltimore and nominated Lewis Cass for President. Two delegations appeared from New York, one representing the anti-slavery portion of the Democracy, the other representing the other side. The delegates of both were admitted to the convention, each with half the full vote. On the return of the delegates to New York, a meeting was held in the City Hall Park, where Mr. Field presented the following address, which, as the newspapers of the day stated, was “ received with great cheering and unanimously adopted.”

TO THE DEMOCRATIC REPUBLICAN ELECTORS OF THE CITY AND COUNTY OF NEW YORK: The freedom and equality of man are the foundations of republican government. The faction which strikes at them strikes at the existence of our institutions. It must be overthrown, or they will perish.

Such a faction exists among us at this moment. Its object is the perpetuation and extension of human servitude. It is bold, unscrupulous, and active; it wields, to a great degree, the patronage of the Federal Government; it thus addresses itself to the fears of some and the cupidity of others; and it has by these means got possession of the late nominating convention, and proclaimed a candidate for the Presidency.

To this faction we will not submit. We will never cease to resist it till it is effectually defeated. And we take this occasion to explain to you in a few plain words the ground on which we stand.

We consider ourselves not bound in the least by the action of the Baltimore Convention. Party being merely a voluntary association of persons having the same general views upon political subjects, consultation among its members is the only way of ascertaining the views of a majority of them respecting the means of promoting their common principles, and, when these views are fairly ascertained and truly expressed, the minority conceive themselves bound to acquiesce. The essential conditions, therefore, of the obligation of such consultation, are: 1. That those only are bound who are admitted to the consultation. 2. That those who are admitted are



bound only by the action of such as are themselves admissible. 3. That all enter on equal terms, and are equally bound; and, 4. That the consultation is fairly had for the common purposes of all. Every one of these conditions was violated by the Baltimore Convention. Consider its conduct.

A nominating convention is a meeting of delegates, to select a candidate for their constituents, because the constituents can not attend themselves. What constituents are bound? Those only whose delegates are received. The delegates of New York were not received. We say they were not received; because, though admitted within the bar of the convention, they were not received as the delegates of New York. They were admitted as half-delegates; each one with a spurious delegate attached to him, a neutralizing adjunct to stifle his voice and paralyze his arm. It was the same thing as not receiving them at all. This, of itself, is enough to destroy the value of the nomination; but it is not all.

A majority of the delegates from the other States, not finding delegates from one of the States, manufactured them for the occasion. South Carolina had sent no delegates—had refused to send any. One portion, however, of one congressional district—that is, a part of one seventh of the State—had sent a delegate to represent that part of the district, and no more. This man, the representative of a part only of one seventh of the State, was taken by the convention, and swelled into the dimensions of nine delegates, so as to represent not only the other part of his own district, but the other six districts of the State, and two State delegates besides. This was just as proper as if the convention, not finding any delegate from half a dozen States, had taken a dependent from the lobby, and said to him: You sit here and vote for the absent States. Now, if our delegates had been in the convention, neither they nor we should have been bound by a nomination effected by means of such a manufactured delegation. South Carolina is not bound by the nomination, because she had no delegates there. No more should we or any other State be bound, because it was not made by those alone who were delegates. Let it not be said that the admission of these fictitious votes made no difference in the result. It was the vote of the

man from South Carolina which rejected our delegates in the committee by a majority of one.

The delegates from Virginia, Georgia, Alabama, and Florida, entered the convention and took part in its proceedings, with a disclaimer, on their part, or that of their constituents, of being bound by its action, if it were not agreeable to them. The votes of such delegates could not lay an obligation on others, which they refused to assume themselves, and therefore the convention, moved and swayed by them, imposed no duty on us or on any portion of the Democratic party, unless it be that of resisting it.

Finally, the nomination was not fairly made; it was not made by the whole Democratic party and for the whole, but by a faction for the benefit of the faction; it was made not on national but on sectional grounds. This brings us to the great principle which lies at the bottom of this contest. Attempt to disguise it as they may, the real truth can not be concealed, that the struggle now begun, and about to be decided, is between freedom and slavery; between those who seek the spread of slavery, on the one hand, and on the other Democrats, who, though willing to abide by the compromises of the Constitution, and leave slavery where they find it, are yet not willing to spread it further.

To deny that the question of slavery was the only one that really entered into the nomination, would be to deny what is notorious to all the world. We know that the nominee obtained his nomination only as the price of the most abject subserviency to the slave power; that our delegates were rejected because they were freemen, maintaining the rights and speaking the language of freemen; that the representatives of the slave power, by means of the public patronage, which they have been permitted to use for years, by violence and by fraud, dragooned and misled delegates from the free States, so as to form, with the delegates from the South, the majority which the candidate finally obtained. Knowing this, we should be false to ourselves, false to our country, forgetful of the past and indifferent to the future, if we did not declare that we reject and condemn this nomination.

Consider what it is that the slaveholders demand. Under



the pretense that citizens of the States have the right to emigrate to any Territory of the Union with their property, they claim that the institutions of the Territories must be overturned to suit the institutions of each of the States, no matter how peculiar. If a Georgian may carry his slaves with him into California, and hold them there, though slavery be there abolished, he may carry with him any other domestic institution of Georgia, however repugnant to Californian institutions. Nor is that all; the institutions of the Territories, being at the mercy of every single State, a Territory can have no fixed institutions. In Oregon, at this moment, a man is restricted to one wife, and a child becomes of age at twenty-one. But, according to this new doctrine, if Texas were the next year to allow polygamy, and to extend the term of minority to twenty-five, as do some nations, polygamy would be thereby established in Oregon, and four additional years of tutelage would be imposed upon every child beyond the mountains. The argument necessarily comes to this, if it be good for anything. There can not be one law for a citizen of Texas who emigrates to the Territory, and another law for an emigrant from a different State or a settler already there. If one slaveholder may carry his slaves there, every other man already there may instantaneously take slaves himself.

They greatly err who, because the Constitution recognized slavery in the old thirteen States, infer that we are therefore to extend it to all new countries which may fall within the sphere of our influence. There is nothing in that instrument to warrant such an inference; there is everything in the history of the times in which it was made to indicate the contrary. The convention which framed the Constitution and the Continental Congress were sitting at the same time, in Philadelphia. On the very day when the provision of the Constitution was adopted by one body giving a representation of three fifths upon slaves, the Ordinance of 1787 was adopted by the other. Who can doubt that the two bodies acted in concert, and that the patriots of that day, whether from the North or the South, while they admitted the representation of slaves, where slavery then existed, intended that such representation should never be extended, and therefore prohibited slavery in

the only Territories we then had, and the only ones then supposed likely to come into the Union?

But the times have fearfully changed since then. The patriots of the Revolution did not think slavery a good, or wish for its extension. On the contrary, they hoped for, and thought they foresaw, its early extinction. But now, strange to tell, there are panegyrists of slavery swarming through the South, and, stranger still, they have panders at the North. The slaveholders and their instruments demand the establishment of slavery in all the Territories we acquire from Mexico. They are even now clamoring for its establishment in Oregon, and the walls of the Senate-chamber are echoing with this insolent demand. Neither California nor Oregon tolerates slavery by its laws. But these men claim that it may be carried and planted there, for no other reason than that the Territory belongs to the Union. The authority they invoke is the flag of the country. They degrade that flag from a herald of freedom to a herald of slavery. They make it the signal, not of emancipation, but of bondage.

What say you to this, fellow-citizens of New York? The alternative is before you. On one side you see the most stupendous aristocracy of land-holders which the world contains, grasping at the new territory of the Union, and ready to divide its free soil into vast plantations cultivated by slaves, to the exclusion of free labor; on the other side, true democracy, careful for the rights of all, esteeming slavery a local institution, which the Federal arm does not extend, and insisting that, where there is freedom now, slavery shall not intrude, that our vast Pacific domain shall be consecrated to free labor and be the home of a free people; that its valleys and its riversides shall not be darkened with negro cabins scattered over slave-plantations, but shall smile with villages raised by free emigrants from our own and other lands.

In this time of political regeneration over all the world, when old oppression is falling to the ground, and man is everywhere struggling to emancipate himself and to emancipate his fellow-man, shall our dear land, the oldest of existing republics, the model of all the rest, stand as the champion and the missionary of slavery? Let your voices, fellow-citizens, now, and

your votes in November, give your answer, an answer that the panegyrists and promoters of slavery at the South will remember; that the panders to slavery among yourselves shall not forget; which will show, that while we abide by the compromises of the Constitution, we go no further; that we will make no compromise with conscience, or renounce our obligations to our race and to our God.

In consequence of this break in the Democratic ranks, a mass convention was called at Buffalo, which made an independent nomination of Martin Van Buren for President and Charles Francis Adams for Vice-President. In the course of the canvass Mr. Field made several speeches, among them one in Faneuil Hall, Boston, on August 22, 1848. He was introduced by Mr. Sumner, and, after waiting several minutes for the applause to cease, spoke as follows:

What can I say, fellow-citizens, in behalf of my own State, and of myself, in answer to such a greeting? What can I say, but that I thank you—thank you on behalf of New York, and thank you on my own behalf? I say now, as ever, that Massachusetts has entitled herself to the thanks of the Barnburners of New York, and we render them to you now from our heart of hearts. I felt so at Buffalo, and I feel so now. When I saw your delegation rising, almost as one man, to vote for Martin Van Buren as President; when I saw, as the names of Massachusetts men were called, the first person of your delegation, Stephen C. Phillips, with his majestic form, rising, standing erect, and pronouncing the name of Martin Van Buren; and when I heard, next in order, the name of Mr. Dana, who has addressed you to-night, and heard from his lips the same sound, Martin Van Buren—I turned to one of our Barnburning friends near me and said, “It is all over, and all right.”

Once more, then, let me thank Massachusetts, let me thank Boston, let me thank this great audience, who have come up here to participate in this jubilee of freedom.

Fellow-citizens, it would ill become me to open my lips for the first time in Faneuil Hall without rendering my homage to the genius of the place. I feel that I stand on consecrated ground. Every pillar, these galleries, these walls, and this roof speak but one language of uncompromising hostility to tyranny, great and small, here and everywhere. They all answer to the word “Liberty,” and that is the only word, I



will venture to say, that can awaken all its echoes, deep and strong. I feel, too, that I stand here, not only in the presence of the living, but of the illustrious dead; and that they listen to us from these arches. Let our words and our demeanor to-night be in unison with the omen. Fellow-citizens, great as have been the questions agitated in this hall, momentous as have been the subjects here discussed, and great as has been the effect of the pulsations of this great heart of New England, reaching even to its utmost extremities, I venture to say that never since the Revolution has a subject been agitated of more momentous importance, than that which we come here to discuss to-night.

Will you bear with me for a few minutes, while I endeavor to discuss this question in the frankness with which a freeman should speak to freemen; and if there be any within the sound of my voice who do not agree with me, I hope none the less that they will take in good part what I may say. Our motto—the motto of the Barnburners—is “free speech,” as well as free men. I use, therefore, to you free speech. If there be present anybody who intends to vote for Cass or Taylor, so much the better. Let him listen to me, and when it comes my turn I will listen to him. Then, fellow-citizens, in sober seriousness, what is the practical question, and what is the principle at the bottom of that question; and what is the course which it becomes us to take in reference to the question, and the principle? That is the subject to which I wish to call your attention.

In the providence of God, we, the people of the United States, have acquired upon the shores of the Pacific a domain as large as two thirds of the United States of America east of the Mississippi—a domain reaching through ten parallels of latitude, and stretching eastward from the Pacific to the Rocky Mountains and beyond. This great domain, these vast provinces, now contain not a slave. Slavery does not exist there, and the question is, Shall we plant slavery on that virgin soil? (“No!” “No!” “Never!”) Never, never! This country, fellow-citizens, is great for its extent, is great for its natural advantages, great for its capacious harbors; greater still to be, for its influence upon the Polynesian Islands, and

upon Asia ; for, in the progress of empire, Asia itself is to be Christianized and civilized, not eastward from Europe, but westward from America. And the power that is to be planted upon the shores of the Pacific will spring from the soil on which we now stand. We hold the destinies of that country ; and I am speaking of a country which I believe is to exercise a greater influence in the history of the world than any other country of equal size. Shall we plant it with freemen only, or with freemen and slaves ? (" With freemen ! ") Yes, with freemen ; but the slaveholders, and their slaveholding allies at the North, insist that you shall make a compromise, at the very least, upon the line of  $36^{\circ} 30'$ . Now this is giving up—how much do you think ? It is giving up a domain that will make five States as large as Indiana, a domain as large as France. Now, fellow-citizens, when you consider what France is, and what France has been ; when you read her history of glory and power, can you imagine it to be a matter of indifference to any conscientious man, or to any human being, what shall be the institutions planted upon such a country ?

Therefore, I tell you that the practical question for you to settle is this : Can you, will you ever give up to slavery this region of country south of  $36^{\circ} 30'$ —this vast domain beyond all price, which should be consecrated to freedom ? (" Never ! ") No, never ; men of Massachusetts, let us have that word repeated again and again, till we consecrate freedom in our statute-book, over all our Pacific provinces. Yes, we will have all that land smiling with villages, like the villages of your own New England, with the song of liberty heard along its valleys and on its hill-sides, and not once, not once, the cabin of the negro slave.

On a former day, in the bright days of the republic, one of its great men said, " Millions for defense, but not a cent for tribute ! " and so say I now ; everything, everything for freedom, but not an inch for slavery.

But, fellow-citizens, great as is this question, the principle at the bottom of it is still greater. And that principle is this : The slaveholders of the United States insist that because these Territories belong to the United States, that is, as they interpret it, to the States united, they, the people of the States, are

tenants in common, and have a right to go there with their property, as they call it, to go and settle there with their slaves. Now the fallacy of this argument is apparent to anybody who reflects, because the principle does not depend upon the question of color. If they have a right to take with them negroes as property, they have a right to make property of white men and take them also. Yes; if the principle be adopted, South Carolina or Georgia may pass a law, giving every father property in the children of his loins, authorizing him to settle with them there. And if you adopt these accursed principles, they have a right to carry them there, and hold them there, and not only so, but every brother of the man living there, or going there, has the same right. To explain this idea of theirs in another form, and it is the most revolting that can be presented in America, they maintain that wherever the standard of the republic is planted, slavery is planted with it. Will you submit to that? Will you allow that desecration of your own glorious standard? Is the standard which your forefathers unfolded on Bunker Hill in 1775, so desecrated in the year 1848? Did they have flags that carried on their folds human slavery? Never! In the eye of faith, and in the eye of patriotism, this standard of the stripes and stars floats here in glory and in light. It has on its folds this legend: "To proclaim liberty throughout all the land, to all the world, to all the inhabitants thereof." And no such device of sin and shame as these slaveholders pretend—slavery, human bondage, chains, and the sale of men and women.

Fellow-citizens, when I think of what our forefathers have endured in the cause of this country, of its history early and late, of the progress we have made, and of the name we have made in the world; when I think of the Declaration of Independence, and the truths that it proclaimed—I feel a sense of degradation in hearing it said, even by a single individual in the Congress of the United States, that we of all the nations of the world bear upon our flag the stain of inevitable slavery. There is not, I undertake to say, a parallel, in story or in fable, to that exhibited by these conspirators against the rights of men, the men who assembled in your Senate the last winter, and endeavored to force upon the reluctant North this odious



doctrine. There is no parallel anywhere to be found except that exhibited by Milton when he described the infernal spirits fallen into the lowest pit as—

“ Highly they raged  
Against the highest, and fierce with grasped arms  
Clashed on their sounding shields the din of war,  
Hurling defiance toward the vault of heaven.”

The principle at the bottom of all this agitation is the principle maintained at the South, that we carry human servitude with our flag, and can not eradicate it; that it is bound to the flag by something as strong as the Constitution. It is against this infernal doctrine that we war, more than against the practical question, although that, as I stated before, is the greatest question presented to the American people since the Declaration of Independence.

Now, then, having seen what is the question, and also what is the principle at the bottom of this question, let me call your attention for a while to the course of conduct which it becomes Americans to pursue. We are not permitted by our votes to say ay or no upon abstract propositions. We are not permitted to say directly whether we are in favor of or against this doctrine, but we must signify our approval or disapproval of it by the election to the presidential office; and it is in reference to that, that the election has a significance. Now let us look at it, and consider what ought to be the conduct of every free man in this presidential election. We have three candidates. On our side we have Mr. Van Buren, who says that he is in favor of excluding slavery from these Territories by law. On the other hand we have Mr. Cass, who says that he will veto any bill to exclude slavery from the Territory; and then we have General Taylor, who says that he does not know whether he will or not.

Do I misrepresent the position in which they stand? Let us see for a moment. Mr. Cass proclaimed in his Nicholson letter that he thought Congress had not a right to exclude slavery by law from the Territories; that is, they had not a right to legislate upon the subject; and he said, further, that it belongs to the people of the Territories to legislate upon the matter; subject always to the spirit and the conditions of the Constitu-

tion. I think that is the language; and, furthermore, he says that the diffusion of slavery is no evil, but, on the contrary, it is rather a benefit to the slave. This is Mr. Cass's position. Now let me remind you that of all men on the face of the globe Mr. Cass is the last man to maintain this doctrine. Longer than any living man he held the office of Governor of the Northwestern Territory, having no other source of authority than the laws of Congress. Yes, fellow-citizens, he has in this day turned his back upon the acts and upon the professions of his past life. He has proved recreant to the faith in which he was born, and to the professions of his manhood, and turned himself to the South, and made his obeisance to the Moloch of slavery. Can you, will you ever consent, so far as in you lies, that this man shall be president of the United States? ("No! Never!") Never! To do so, would be to prove yourselves recreant to the principles of your fatherland, to the honor of your country and your birthplace, and to the eternal principles of human freedom.

How, then, stands General Taylor in his Alison letter? You recollect that he says he will not veto a bill unless he deems it unconstitutional, or unless it was passed in evident haste. This is all that you know or that any of us know in respect to his sentiments upon the subject of slavery. We only know that he is himself a slaveholder, owning upward of three hundred slaves, that he lives in the midst of a slaveholding population, that he has had little intercourse with the North, and I therefore suppose as little sympathy with our people. No matter for that, you know nothing of his sentiments upon the subject, you only know by the declaration of that letter that he will not veto a bill unless he deems it unconstitutional, or hasty and inconsiderate action. Now we will pass over the point of haste. I ask you to consider this question. Have you any assurance whatever that General Taylor does not consider, or that he will not consider, a bill unconstitutional which prohibits slavery south of  $36^{\circ} 30'$ ? It is true that in the Alison letter he endeavors to define what is constitutional by saying that whatever has been settled by all the departments of government, and has been acquiesced in by the people, he shall consider to be constitutional. But I ask you again, is



there anybody who can tell me how General Taylor considers this question of slavery to have been acquiesced in by all the powers of the Government and by the people? No one can venture to give an opinion upon that subject, and General Taylor himself when asked whether he did intend to apply this remark to the question of slavery, replies: I won't answer. Now I believe General Taylor to be a man of good intentions. I will do him justice, for I will wrong no man. I believe, moreover, that he will be the instrument of those whom he has been connected with. His Secretary of State will be John C. Calhoun. I know, moreover, that John C. Calhoun believes that it is unconstitutional to pass any act excluding slavery south of  $36^{\circ} 30'$ . Now, as the position of Mr. Calhoun does not appear to be generally understood among the people, allow me to explain it. Mr. Calhoun totally denies Cass's doctrine, and maintains that Congress has the exclusive power over the territories. Where the Government has power to acquire territory, it may govern it too. He maintains that the Government of the United States holds these Territories as a trust for the benefit of those interested in the trust, and can not pervert them to any other purpose, without a breach of trust; and for that reason calls an excluding act unconstitutional. Now, gentlemen, the only precedent that can operate for us is the Missouri Compromise, and that is a precedent by which the slaveholders themselves consented that we might take all north of  $36^{\circ} 30'$  for freedom, if we would give up all south. Thus the objection was obviated because the persons interested in the trust consented to the diversion of the trust-fund. Therefore, you have no assurance that General Taylor himself will not hold that it is unconstitutional to prohibit slavery in territory south of  $36^{\circ} 30'$ , without the consent of the slaveholding States.

The question between these different candidates may be stated in these words: If you take General Cass, you have despair; if you take General Taylor you have, to make the best of it, doubt; if you take Martin Van Buren you have certainty. Can there be doubt how the men of Massachusetts will answer the question? Those who have addressed you have already explained how the nomination of Mr. Van Buren

and Mr. Adams was brought about. It is therefore not necessary, and perhaps not proper, for me to enter into the subject at all. Nevertheless, if there were time, I should like to explain to you how the nomination was brought about. I will do it very briefly. I am one of those persons originally denominated by way of derision and spite "Barnburners." I glory in the name. There are more than 200,000 of us. Now let me tell you a little of their history. The Barnburners in New York were the radical Democracy, as distinguished from what is called the Conservative or the Old Hunker Democracy. That is to say, the Old Hunker Democracy were the Democracy perpetually hankering for monopolies, banks, and all sorts of privileges. On the contrary, the radical Democracy were opposed to them all. During a debate in the Legislature of New York, some years ago, a member said to us: "You are like the Dutchman, who, when he found that his barn was infested with rats, and that he could not get rid of them, set fire to it and burned up all together; and so you will destroy the good to eradicate the evil." The name was thus fixed upon us in derision—Barnburners. We, gentlemen, have taken it up and maintain that we are Barnburners; for we mean to burn the rats, come what will. We will not burn the barn if we can get rid of the rats without it. But, if we can not, let them all go together, I say. We have had enough of rats, and now we mean to get rid of them.

Now, fellow-citizens, let me tell you how this slavery question came before us. After the Wilmot Proviso was introduced into Congress, which was, as you know, by Mr. Wilmot, of Pennsylvania, in the summer of 1846, it became the intention of the South to stifle the expression of the sentiments of the North, through our fears, avarice, and ambition.

They said to themselves: We will declare that we will support no man for candidate who is not against the Wilmot Proviso. We know that we can have more than one third in the nominating convention; we will have a two-thirds rule, and if we declare that we will support no man who is for the Wilmot Proviso, we can get a man who is pledged against it,

and then, such is the discipline of the party at the North, that they will fall in and elect him. Now, fellow-citizens, in New York, when the convention was about to assemble to nominate candidates for State officers, it became necessary for the President makers to stifle the voice of the radical Democracy. They went into the convention with the determination to stifle the expression of our sentiments, and to prevent our sending delegates of our own faith to Baltimore. Therefore, although a resolution was moved that the Democrats of New York were uncompromisingly opposed to the extension of slavery, these conservatives, by a majority of two or three, voted it down, and so voted down the plan of sending delegates from the State in a mass, and determined to send them by districts; the object of which was to neutralize the vote of New York in the convention, and give the votes of all the rest of the States to slavery.

When the Barnburners were called upon to show what they were made of, they did show to the content of the conservatives the stuff they had in them. They assembled in mass convention at Herkimer in less than a month afterward, and boldly denounced the whole proceeding, declaring that they stood upon the eternal platform of human rights; that the only true Democracy was founded upon the rights of man; that every other so-called democracy was a counterfeit, and that they planted themselves evermore firmly against the extension of slavery, and against any alliance with the slave power as such.

Well, then, fellow-citizens, our delegates being sent to Baltimore went there, and were, as you all know, rejected. I say rejected, because though nominally admitted, they were only admitted with a conservative delegative tacked to each of them to neutralize their votes. The effect was that General Cass was nominated as the Democratic candidate for the Presidency. Then came a dark day for the Barnburners of New York. They knew not that they could get assistance from any other State, but they resolved to stand in their own might. They decided to meet at Utica, and to nominate a candidate for themselves. Since they had had no voice at Baltimore, they were necessarily driven into this position.



They determined, if they stood alone, to fight it out to the last—never to surrender an inch.

They went to Utica and cast about for a candidate, and of all the public men to whom they applied for leave to present their names as candidates, there was not a single one who did not quail before the storm, excepting that grand old man, Martin Van Buren. He told us that his public life was done, and for that reason he could not be a candidate for any public office, but that he was with us, heart and soul, now and ever, from beginning to end. For his part, he would vote neither for Cass nor Taylor, and if there were no other candidate, he would not vote at all. We were driven into the position that we found that we must nominate Mr. Van Buren, come what would. We must force him into the position of a candidate. We knew that he was made of too stern stuff to desert his friends. I know that with the greatest reluctance and misgiving he at last consented to surrender up everything to us, to do with him as we liked; and we nominated him then and there.

It was in this position that the Buffalo Convention found us. After the nomination of Mr. Van Buren, the opposition to slavery was strengthened to a degree that in our fondest hopes we had never dreamed of. We found that not only our State but the nation was moving, and soon there came up to Buffalo such a host as no man could number. But what the Barnburners were there to do was a matter of great doubt to themselves. They felt that they were in honor bound to Mr. Van Buren. He had been almost forced to be their candidate, and they could not desert him. None of them durst ask him if he would decline; and for one I would have had my hand fall from my side before I would have written him a letter upon the subject. But to the relief of all, unexpectedly and unasked, there came from him a letter which made everything right, which cleared the sky for us all. "Everything for the cause, and nothing for men," said he; "throw down my name in an instant if it is in your way. Take up anybody that will carry on your cause, for my name is not worth talking about."

Then we saw the generous spirit of the other delegates. The delegates from Ohio had nominated him; then one of

your delegates proposed that he should be unanimously selected as their candidate, and the convention unanimously nominated Mr. Van Buren to the Presidency with loud acclamation. After that was done, it was proposed to nominate Mr. Adams for the Vice-Presidency, and that also was done by acclamation, rising from those many voices louder than ever. Although we have had eleven Presidents, but four have been from the free North, and not one of them thus far has been permitted to have a second term. Then let me call to your mind that we have now as a candidate for the Presidency the only surviving President from the North, and as our candidate associated with him, the grandson of one of those Presidents, and the son of another. Whether this be accidental, whether it be fortuitous or not, I can not say. But it appears to me as if the North was determined to vindicate in these persons above all others the right of the North to a participation in the government of the country.

Having thus, at greater length than I intended, because you desired me, gone into the history of the matter in New York, let me ask you whether there be any cause which more appeals to the sympathies of every true and free man than the cause which we to-night present to you? Is there anything to which the men of Massachusetts and the men of Boston can respond more readily than the nomination of these men thus made, with the principles thus developed? But I think I hear some weak brother saying: "This is all right; your principles are right; my heart is with you; but I don't like to divide the party." If there be any such here, let me ask him if he has seen the extraordinary spectacle presented by the South? Has he observed that in the Senate of the United States John C. Calhoun went shoulder to shoulder with Reverdy Johnson and Berrien—Whig and Democrat making no distinction—to put down the North? Shall we then not present a united front? Shall we suffer ourselves to be divided when they are not divided? Let me ask further, has any such brother read the last message of the President of the United States? Let me read you a passage from it:

"This is a question of such transcendent importance as to cast into the shade all those of a mere party character."

We accept the challenge. Shall we be so inexpressibly foolish as to be fighting among ourselves about questions of a mere party character, when the South, when the President of the South from his high place, proclaims that they are cast into the shade by the question of slavery? No, fellow-citizens, we should be ashamed of ourselves, if upon this question we did not sink every other as utterly subordinate, and rise in the majesty of freemen to vindicate the rights of freemen.

Again, some still weaker brother—yes, there are even weaker brothers than this—some still weaker brother, says to us: “Oh, you will dissolve the Union!” Dissolve the Union? Dissolve this Union? And for what? Because we will not consent to plant slavery upon free soil? Fellow-citizens, this bugbear of a dissolution of the Union has been so long shaken in our faces that it is about as potent as those grisly faces which the Chinese paraded in front of their troops to frighten away the English. They thought, poor souls, that the moment the English grenadiers saw those ghastly faces they would run away! But they found that the English were proof against such fear; and the South, I think, will find that we are proof by this time against this bugbear of the dissolution of the Union. Fellow-citizens, I would consecrate myself to the Union. Every freeman consecrates himself to it. We hope and believe that it is to be eternal. Talk of the disruption of the Union! Why, a disruption is as impossible as a disruption of the great globe itself. The Almighty, with reverence be it spoken, the Almighty with his hand has impressed upon the features of this continent an eternal bar to the disunion of this country. Look at it for a moment.

The great valley of the Mississippi controls the East and the West. Stretching out, on the one hand, to the Pacific, across the Rocky Mountains, and, on the other, to the Atlantic, across the Alleghanies, it says to each, “Be still,” and they can not be separated. The God of Nature has planted upon the features of the Mississippi Valley that which is stronger than the devices of men. He has made a bond of rushing waters which no man may break. They who dwell upon the banks of the Missouri and of the Ohio will evermore control the mouth of

the Mississippi. It is the nature of things that it should be so. Disunion is as impossible as for a man to place his hand across the waters of that mighty stream and turn it backward. Then let us have done with disunion and with this talk of disunion. You may perhaps alter the terms, but the great fact of Union never can be altered. The people of that valley must of necessity dwell under one government, whether this or some other, and whether it be unaltered depends upon the people. If the South are not satisfied with present terms, they must live with us on terms that may be worse.

Then, fellow-citizens, I repeat, our course is plain. Everything in the history of this movement from the beginning, everything in the history of this age, everything in the history of this country, calls upon us to be faithful unto the end, and we shall surely achieve the victory. The spirits of the past call upon us from these arches, and I hear them say: "Go on, go on, as you have begun; be faithful unto the end; be ye not cowards, but men. Despise equally the threats of power and the smiles of patronage. Suffer no dishonor to fall upon your flag. That flag is ours, and let it never bring shame to your and our country." And, finally, they say to us in the language of that sublime Christian precept—sublime from its simplicity and its heroism—"Be just, and fear not!"



## FREE SOIL, FREE SPEECH, FREE MEN.

The breaking away of anti-slavery Democrats in New York from the Democratic organization. An address before the Democratic Republican State Convention at Syracuse, July 24, 1856.

FELLOW-DEMOCRATS: The time has come for Democrats to declare their independence of those packed conventions which have lately assumed to dictate the measures and the candidates of the Democracy. That party of glorious memory, which once spoke and acted for freedom, has fallen into the hands of office-holders and political adventurers, serving as the tools of a slaveholding oligarchy. For more than ten years the measures of the General Government have been directed mainly to the increase of slave States. One measure has followed upon another, each bolder than the last, until we have violence ruling in the Federal Capitol, and civil war raging in the Territories.

For the consummation of each measure the venal have been purchased, the timid frightened by threats of disunion, the peace-loving soothed by promises of future quiet, and the reluctant and resisting silenced or overborne by the clamor and force of party. Each success has led to a new aggression, until at last the weak man now at the head of the Government, stimulated by a Senator from Illinois, in a rivalry for a Presidential nomination, and believing that the best means of reaching it was to secure the entire Southern vote, and the best means of obtaining that a new sacrifice to slavery, attempted to force through Congress the repeal of an existing law, by which a compromise had been effected by our fathers more than a third of a century ago. These rival demagogues succeeded in effecting the repeal, though they lost their reward.

By this act of crime, unparalleled even in our day of political crimes, one of the fairest regions of our country, and



indeed of the world, has been converted into a field of battle, where citizens of a common country are fighting with each other for the introduction or exclusion of human servitude. Such another spectacle the world does not present. And the end of it is dependent upon the event of a Presidential election.

To excuse themselves, the authors of the measure put forth the plea that the people of the Territories have the right to govern themselves. If this were true, it would not have justified the Kansas-Nebraska Act, for that was a mere abandonment of Congressional interposition in favor of Presidential interposition, pretending to leave the law-making power to the people, but reserving the executive and judicial to the President or his nominees. It was an abdication by Congress of its legislative functions respecting the Territories in favor of the executive.

But the plea was as untrue in fact as it was unworthy in motive. They who put it forth have already abandoned it. The Senate has passed a bill proposing to annul some of the most obnoxious acts of these law-makers; and the authors of the mischief, shrinking from the consequences of their own acts, and forgetting that others will remember their tergiversation, attempt to escape some of the condemnation by undoing a part of the evil.

If the people of the Territories have the right to govern themselves, they may make their governors and judges as well as their legislators. If they have not the right, Congress has it; and if Congress has it, it must be exercised according to the judgment and conscience of the country. The true question, therefore, is, What legislation on the subject of slavery in the Territories do the judgment and conscience of the country require?

The present question is, indeed, narrower than that, for it relates merely to the Territories of Kansas and Nebraska. These the legislation of Congress, perfected in 1820 by the votes of the North and South—chiefly South—solemnly and forever set apart as free soil. That dedication of the soil to liberty the degeneracy of the present day has annulled. And the legislation which is now required is that which is necessary, whatever it may be, to make Kansas free.

This is demanded alike by every consideration, past, present, and future. If Kansas, which the past made free, is now to be changed to slave, there must be an end of compromises and of conciliatory legislation; the faith which prompts one Legislature or one generation to respect the engagements of another must disappear; and how long a government can be carried on without that faith and confidence, without something more than written constitutions, worked by mere majorities regardless of everything but their own strength and will, they who have read history can answer.

If the present struggle is to end, as the Illinois Senator has boasted, in the subjugation of those who opposed his mischievous bill, then, indeed, is the spirit of evil let loose, intimidation and violence are in the ascendant, the real opinion of the country is a thing to be despised, conscience may be laughed at, and it is of no importance to the President or Congress what the people of the North may wish; if the South can be secured, with the Northern office-holders and purchasable members of Congress, any measure may be safely carried and maintained. How such a state of things commends itself to the spirit or self-respect of Northern electors we ask them to answer.

But what shall we say of the future? Kansas lost to freedom, and no longer a home for the oppressed of all nations; free labor driven across her borders, and that noble domain of the New World, broader and fairer than many a realm of the Old, made, not prosperous and rich, like Wisconsin and Iowa, but half barbarous, like Western Missouri!

That, however, is not the worst consequence. The same spirit which contrived the Kansas conspiracy already hints that the prohibition of the slave-trade is an unjust discrimination against the South. And why not? If slavery be no evil, or if a Federal legislator may not legislate on the idea that it is an evil, why should he make it piracy to bring a slave into the country? Why not let each man buy, according to his own conscience, what he finds to be property, or, which is the same thing, what he finds anywhere to be salable? The same principle which justifies the Kansas Act must justify the slave-trade, and condemn, as an infringement upon the equal

rights of the South, the exclusion of the foreign traffic. That step being taken, and it is the next if the present succeeds, then slavery is virtually established in all our States, for, according to the high Federal, or, as the phrase is, the *national* doctrine of some of our courts, whatever Congress authorizes to be imported may be sold, any law of any State to the contrary notwithstanding.

No, fellow-Democrats, our only safety is to stop where we are—to make Kansas a free State—to punish the authors of the present agitation, and in that way, for that is the only way in which it can be done, to put an end to the slavery agitation.

How is this to be accomplished? By rejecting the Cincinnati Convention and its nominees—for they are inseparable. That convention met while the country, or, at least, all but the Southern part of it, stood grieved and shocked by the violence and lawlessness in Washington and in Kansas. But not a word of disapprobation did the convention utter. They resolved upon certain truisms which nobody has ever disputed; passed a resolution against a Bank of the United States, as if anybody had dreamed of such a thing for years—a subject just as pertinent to our present circumstances as the Virginia or Kentucky resolutions; and then gravely resolved that every new State must form its own institutions, by implication denying both to Congress and to the Territorial Legislature the right to exclude slavery. It must also be borne in mind that the author of the Kansas Act and the nominees of the Cincinnati Convention have to this day declined to say that the people of the Territories have the right to exclude slavery.

Who does not know that no free State has ever yet been admitted into the Union into which, as a Territory, slavery was admitted? Who does not know that slavery will go wherever a slaveholder goes, if he is permitted to take it with him; that in Kentucky slavery exists in a higher latitude than some counties of Ohio and Indiana, and in Missouri, several hundred miles farther north than the southern limit of the free State of Illinois? Who does not know that it is an institution easily planted in the infancy of settlements, and most difficult to be eradicated in their maturity?



But why not let the people of a Territory decide the question for themselves? Thus say these new professors of "Squatter Sovereignty," or at least they said so before they introduced fire and sword into Kansas to disarm the squatters, in violation of "the right of the people to bear arms"—to break up their meetings, in violation of their "right peaceably to assemble and petition for a redress of grievances"—to disperse their assemblies, gathered to make their own laws—to burn their houses, built with many toils and sacrifices in the midst of the prairies—to hunt their wives and children into the wilderness, their only refuge from the fury of these guardians of squatters' rights. Why not let them decide the question for themselves? If they who decide were only deciding for themselves, there might be some plausibility in the question. But they decide for themselves and for all future inhabitants of the Territory. They who come into a Territory after slavery is introduced have not a free choice in the matter. At the very least, wait until there is a sufficient population to make a State before you let slavery come in. Was it ever heard that, when a ship's company is making up for a voyage, the first ten passengers who put their feet on board may make rules for the ninety who follow—rules that must be unalterable until the ship shall have been a hundred days at sea? And was it any better to provide that the few squatters who entered Kansas before March, 1855, should make laws which could not be altered for two years, even though the population should in the next year have increased a hundred-fold?

Then, it is asked, what interest is it to us whether the people of Kansas have slaves or not? Is it of no interest to the people of this generation throughout the country that Virginia is a slave State? If she had been free, what would now have been her population, her wealth, her resources, her rivers white with sails, her ships all over the globe, her lands cultivated like a garden? If it had fallen to the lot of any statesman of a past generation to decide whether that Commonwealth should be free or slave, and he had, for any motive, allowed it to become slave, how would his memory have been cursed by every true Virginian of our day! Who that looks now at Missouri does not see the bitter fruits of that weakness or facil-

ity of temper which led a few Northern men to unite with the South in yielding it up to slavery? And hereafter, when we who are now in life are passing into the grave, will it not be a stain upon our names and a shadow upon our consciences if, having the power to prevent it, we shall permit Kansas to be a slave State—another marauding Missouri, instead of a peaceful Iowa, or even a Virginia, instead of a New York or Pennsylvania?

Mr. Buchanan, the candidate of the Cincinnati Convention, stands pledged to make the resolutions of that convention his rule of faith and practice. If we are to take his own declaration, he is to be rather an automaton than a free agent. The convention which nominated him—that motley and noisy crowd which nobody would have allowed to decide a matter of business of the smallest importance for himself—has done the thinking of the President for the next four years, if Mr. Buchanan should happen to be that President. Such a candidate, under such circumstances, we can not support.

Shall we, then, throw away our votes? That we can not do, for two reasons: One, that we shall thus indirectly contribute to Mr. Buchanan's election; the other, that there is a choice. Mr. Fremont, who has been nominated by the Republicans, is an acceptable candidate. His professions and his antecedents are all democratic, and strongly in his favor. He is known to be a man of great capacity, energy, and honor. In his hands the Presidential office will be vigorously and justly administered. We have, therefore, nominated him for the Presidency, and his associate, Mr. Dayton, for the Vice-Presidency; and we ask you, Democrats of New York, to ratify this nomination.

We make no attack upon the South. We remember that the Southern people are our brethren, and brethren we mean them to continue. But they shall not interfere with our rights, nor introduce their institutions into our States, nor fasten them upon the Territories before those Territories are mature enough to be States, and as such to determine their own institutions. We know well how many noble men and women there are in all the South, and we believe that many of them agree with us in respect to the extension of slavery.



It is the Southern politician and the Northern traitor who have done the mischief, and whom we wish to restrain.

We make no attack upon State rights. We do not believe in the right of the people of one State to interfere with slavery in another. We no more believe in the right of New York to unmake a slave in Georgia than in the right of Georgia to make a slave in New York. The laws of New York and of Georgia must equally determine the personal relations of all within their respective limits. But, believing that the Territories are under the jurisdiction and subject to the legislation of the Union, confident that there can be no peace in any Territory bordering on a slave State, but by an act of Congress declaring the personal relations of its inhabitants, without which civil war is inevitable; and believing, moreover, that as the Territory is, so will the State be, we are firmly and unalterably opposed to the introduction of slavery into any Territory of the United States.

Such is the disordered state of affairs under the control of the General Government as to demand of every citizen the most vigilant scrutiny and the gravest deliberation. Each elector throughout the United States has an important office to perform at the coming election; and in any neglect to exercise that invaluable right, or any indifference as to the manner in which it shall be exercised at a crisis like this, he is guilty not only of an ordinary omission of a known duty, but of gross negligence, approaching criminality.

How has it happened that the sham Legislature of Kansas, elected by the combined influence of fraud and force, has dared to do any act bearing even the name of law? How dared such a body so abuse the civilization of this age as to expel some of its members for no cause whatever, and to pass a code of enactments which would disgrace a council of savages? Why has the property of the peaceable citizens of that Territory been destroyed, their liberty invaded, and their lives wantonly sacrificed? Why do gangs of marauders from the adjoining State pervade this Territory? Why the interruption and abuse of settlers on their way thither, and the tone of arrogant defiance and abuse from Atchison, Springfellow, and their associates to the free-State men of Kansas? All this

has been done under the pledge, express or implied, of the national Administration, so that every measure tending to the establishment of slavery there, and the exclusion of freedom, should have the hearty co-operation of that Administration. Many other pledges of this Administration have been broken, but *that pledge has been kept to the letter.*

Why has Judge Kane held that slavery so far exists in the free States as to allow parties of pleasure and others to invade these States with their retinues of slaves, and there to hold them in the yoke of servitude? Surely it must be to tutor the free North into acquiescence or subserviency to the institution of slavery. Why has the slave-trade sprung up in such alarming strength, and been carried on by traders residing in the city of New York during the past year? Why have Mr. Buchanan and his associates at the Ostend Conference unblushingly claimed the right of our Government to take Cuba by force, if it could not be gained by purchase? Why has the Cincinnati Convention followed up the Ostend manifesto with the more startling announcement of the duty of this Government to exercise a protectorate over the whole country bordering on the Gulf of Mexico? Why have Douglas, Pierce, and Buchanan in succession become converts to the new doctrine that the General Government has no power to control the Territories?

Why have the arms of the nation been turned to oppress our own citizens? Why has the subject of slavery been agitated by the President, contrary to his express pledges, and the treasure of the nation poured out in profusion upon the supporters of that institution?

These are questions which electors will not fail to inquire into and answer at the ballot-box.

The abusive and indecent epithets used by the chief supporters of Mr. Buchanan against the friends of Fremont; their disparagement of freedom and encouragement of slavery; their abandonment of every Democratic principle, and their devotion to the most odious of all oligarchies, must shake the confidence of the electors in that party, and make the party itself as desperate in its fortunes as it is corrupt in its means of attaining success.

If the spirit of hostility to our free institutions, manifested by the supporters of Mr. Buchanan, had been as violent during the days of Washington, Jefferson, and Madison as it now is, those patriots would have been driven from their native State for their love of liberty, and compelled to seek protection where sentiments in unison with their own were held sacred.

The attempts of the Buchanan party generally to misrepresent the true condition of affairs in Kansas; its desire to make light of the depredations committed by the national Administration party against life, liberty, and property; the open applause or silent acquiescence of the same party in appeals to brute force, exhibited at the Capitol of the nation during the present session of Congress; their efforts to induce Congress to pass the bill concocted by Senators Toombs and Douglas, containing an ingenious but effective guarantee of slavery in Kansas, though persevered in with that clamorous assurance and dictatorial air strongly characteristic of gross wrong—must and shall be thoroughly canvassed and exposed. The people will not fail to stamp such duplicity with merited condemnation.

The series of measures terminating in the repeal of the Missouri Compromise has proved disastrous to the political prospects of the originators and promoters of the scheme, and subversive of public tranquillity. Mr. Buchanan is a fresh recruit to this service. He has surrendered his principles to the dictation of others. His *antecedents* are strongly against him. He is not a sound representative of the true Democracy of the nation. With his tendency to foreign aggression and domestic strife and discord, he is eminently fitted, by nature and position, to carry out the policy of President Pierce in all its parts. The one has introduced civil strife among our people as the most noticeable feature of his administration—the other, if elected, seems likely to adopt the same feature in his domestic policy, and also to embark in foreign wars for the purpose of conquest. This convention is prepared to stamp both of these projects with unreserved and unalterable condemnation.

President Pierce promised the Democracy of the nation



an economical administration of the Government. In this, also, his pledges have been broken. No Administration has been more prodigal than his. The time which he should have devoted to retrenchment and reform has been lavished in fruitless efforts to secure his own renomination and re-election. The dupe of the Cushings and the Davises, his treachery to principle was paid off at Cincinnati with a cheap recompense—THE VOTE OF AN INSINCERE AND HEARTLESS MINORITY. We trust that the defeat of Mr. Buchanan, in November next, will save him from a similar fate.

If Mr. Buchanan is elected, *Kansas is slave*. If Mr. Fremont is elected, *Kansas is free*. Thus thinking, we shall labor against the one and for the other. And we earnestly ask our fellow-Democrats to aid us in the work.

#### RESOLUTIONS.

*Forasmuch* as the last convention of the Democratic party in this State and the late convention at Cincinnati have not only kept silence respecting the public disorders and violence which now unhappily prevail, but have adopted resolutions on the subject of slavery in the Territories which are at variance with the traditions and the principles of the Democracy, are anarchical in their tendency, and immoral in their results; and forasmuch, also, as the question of slavery extension has been forced by the Administration and the Cincinnati Convention into one of paramount importance, and is made by politicians the hinge on which all other questions turn; therefore

*Resolved*, by the Democrats of New York here assembled, representing the Democracy of the State, That we repudiate these conventions and all their proceedings, and will act as independently of them as if they had never assembled.

*Resolved*, That, as Democrats, we stand on the platform of Jefferson and Jackson, Tompkins and Wright—on principles which do not change with the clamor of packed conventions or schemes of seekers after nominations; and because the extension of slavery has never been and can never be the purpose or result, immediate or remote, of true Democracy, we hereby declare our uncompromising hostility to it, and our firm resolution to resist it by every lawful means; we will vote for no man who contributes to it directly or indirectly, and we will oppose the election of any person who does not oppose it as we do.

*Resolved*, That because the nominees of the Cincinnati Convention are pledged to make the resolutions of that convention their guide and rule of conduct, and because their election would prolong and tend to perpetu-

ate the deplorable misrule of the present Administration; because the exigencies of the times demand the union of all who oppose the extension of slavery, and the waiver, for the present, of other questions of subordinate importance, and because the opinions of John C. Fremont and William L. Dayton on this subject agree with our own, and there is much in their history and character to commend them to our regard, we hereby nominate them for the offices respectively of President and Vice-President of the United States, and will use every honorable effort to secure their election, that we may rescue the Presidential office from the degradation into which it has fallen, and the politics of the country from the corruption which is fast undermining our best institutions.

*Resolved*, That the chief practical question in the Presidential election is the question of freedom or slavery in Kansas. The election of Mr. Buchanan would make Kansas a slave State, and give courage and strength to the slave element in our national Government; while the election of Mr. Fremont will make Kansas a free State, and reduce slavery to what it was in the better days of the republic, and ought ever to have been, a purely State institution, determinable by the States, each for itself, over which the other States have no control, and for which they have no responsibility.

*Resolved*, That as it respects other questions of national or State policy, though the Administration and the Cincinnati Convention have made them to be all swallowed up in this one question of slavery extension, yet we are none the less attached to all Democratic principles and measures, and are none the less ready to labor for them on all necessary occasions.



## ADDRESS OF THE NEW YORK REPUBLICAN STATE COMMITTEE.

OCTOBER 21, 1856.

THE State Central Committee of the Republican party take this occasion to remind the electors of the State of the great interests depending upon the election of the 4th of November, and the importance of immediate and continued efforts till the election is closed. That election is to decide whether Kansas shall be free, or whether slavery may be imposed upon a Territory by force and fraud against the wishes of its people. The party of Mr. Buchanan holds the laws which have fastened slavery upon Kansas to be valid; the party of Mr. Fillmore holds the same; the party of Mr. Fremont, alone, holds them to be void; and void because framed by a mock Legislature, sitting through violence and fraud. It is for the electors of the country to determine which shall prevail; and upon their determination the fate of that vast country, nearly three times as large as the State of New York, depends for a period of time, the end of which no man can foresee.

The election is to decide more. It is to decide whether slavery shall be sectional or national; whether there be a right to take slaves into all the States, and to hold them in servitude in all the Territories; whether this country shall become the propagandist of slavery wherever its arms can reach or its influence extend; whether the doctrine of the Ostend dispatch shall be received as the rule of the Government; whether Cuba shall be seized and annexed, and Nicaragua made a slave State and annexed; whether the elective franchise shall be preserved inviolate, or corrupted and overcome; whether intimidation, violence, and idle threats of disunion from the South be stronger than Northern principle, courage, and self-respect; whether Northern electors can be always divided and misled by the

adroitness of party leaders; whether the politicians or the people are masters.

The visit to Nicaragua of Soulé, the author of the resolution on foreign policy of the Cincinnati Convention, and, thereupon, the re-establishment of slavery on the Isthmus; the instructions to Geary, the new Governor of Kansas, to enforce Territorial laws which establish and fortify slavery—these are but foreshadows of what is to come. The prospect is surely enough to arouse freemen to the exertion of every faculty and the use of every lawful means till the election is past.

The leaders of Mr. Buchanan's party and of Mr. Fillmore's party are coalescing and inducing their followers to coalesce. Already they present the same local tickets in several of our counties.

It is but too evident that the hopes of freedom depend upon the Republicans alone. Let us prove ourselves worthy of the cause and the occasion. We ask all to join us who cherish the fame of their country, and think that the Government which our fathers founded should not degenerate into an instrument for the propagation of human servitude; all who think that a public question once honorably compromised should not be wantonly reopened; all who think slavery an evil, moral, political, and social, which should not be extended; and all who think slavery a good, but that it should not be imposed by force or fraud upon an unwilling people. They alone can consistently vote against us, who think slavery so great a good as to justify any means whatever for its extension.

We entreat Republicans, one and all, to labor incessantly from the present time till the close of the election. We ask them to see that the Republican organization is perfected in every town and school district; that every Republican voter is brought to the polls; that every person is challenged who offers to vote and is not known to be a legal voter; and for the purpose of concentration, encouragement, and concert of action, we recommend that a Republican meeting be held in every town on the Saturday before the election. Republicans, be firm in purpose, unceasing in effort, vigilant against fraud, and you will prevail.

# ADDRESS OF THE REPUBLICAN STATE CONVENTION.

SEPTEMBER 25, 1857.

FELLOW-CITIZENS OF THE STATE OF NEW YORK: Two dangers threaten our institutions—slavery and official corruption. The Democratic-Republican party is hostile to both, and will never cease to combat both as long as they exist.

The influence of slavery has been injurious to the country ever since it began. From the time when it stipulated for the continuance of the slave-trade—twenty years—down to the time when it offered two hundred millions for the purchase of Cuba, it has been the great disturbing element in our political system. It has ever been grasping, encroaching, arrogant, and domineering. It has spread in extent and increased in power. It has appropriated to itself the greatest part of the offices of the Government; dictated its policy, foreign and domestic, and so debased the public sentiment that multitudes now proclaim slavery a good, and its extension a proper aim of Government. Since the last convention of the Republicans of New York, two aggressions have been made by the slaveholders, which are unexampled in our history—the decision of the Supreme Court of the United States in the case of Dred Scott, and the letter of the President to the clergymen who addressed him on the affairs of Kansas. The decision in Dred Scott's case followed naturally upon the presidential election. Indeed, it is hardly too much to say that, but for the untoward result of the election, that decision, which was withheld until the election was passed, would never have been given. If we had elected Fremont and inaugurated a new Administration devoted to freedom, as this and its immediate predecessor have been devoted to slavery, the impulse in favor of free principles would have been so strong as to deter the expression of a judicial opinion so abhorrent to all that the free North holds most sacred, so alien to the principles

we have received from our forefathers. But in an evil hour Pennsylvania faltered, and that day was lost. Let those who contributed to this result see in this decision one of the consequences of their acts—a consequence almost certain to be followed by others of like character, if the efforts of the Democratic-Republicans do not avert them. The next step will probably be a decision from the same court, in the Lemon slave case, asserting the right of a slaveholder to bring his slaves into this State, and hold them here temporarily in bondage. Of course, no court of the State of New York can hold such a doctrine, but the Supreme Court of the United States, as at present constituted, will hold it; and, holding it, precipitate the conflict which is evidently approaching between the free and the slave elements in our social and political system.

The President's letter asserts the most slavish doctrine which has yet been put forth by the national Executive. It announces the existence of slavery in every Territory acquired by the Union, on the ground that it is recognized by the Federal Constitution. Slavery, however, is not recognized by that instrument to exist anywhere, and if its existence in a part of the Union were recognized, it would not then follow that what the free States helped to acquire must necessarily receive an institution which they abhor. The Constitution undoubtedly recognizes the possible or probable existence of laws in some of the States, under which there may be "a person held to service or labor," but such a person need not be a slave. An apprentice is a person held to service or labor. If an apprentice escape from New Jersey into New York, he may be reclaimed; but if his master bring him, he can not employ him here contrary to the laws of our own State. So, if an apprentice escapes across the borders of Missouri into Kansas, he may be sent back; but, if the master take him, he submits himself to the laws of Kansas, or of Congress, which govern Kansas. If it, indeed, be true that apprentices may be taken by their masters into States unwilling to receive them, and there held to service, the time may perhaps come when free black apprentices may be taken by New England merchants to South Carolina, the laws of that State against the introduction of free negroes to the contrary notwithstanding.



Another step in the path of aggression is likely to be the reopening of the slave-trade. We do not see on what principle it can be refused, if the late doctrines of the President and the Supreme Court be true deductions from the Constitution. We have warned the country against this awful and logical consequence. Already we see indications more and more distinct of preparations for such an event, and we shall be very fortunate if the four years of Mr. Buchanan's Administration expire without the accomplishment of what ten years ago would have seemed as improbable, but not more improbable, than the repeal of the Missouri Compromise. When the road of slave extension is once begun to be traveled, and the slave-owners have once tasted the pleasures of success over the free laborers of other parts of the country, it is not marvelous that moderation is forgotten. In the clamor for office and the subserviency to obtain it, the voice of warning is unheeded and morality is silenced.

Fellow-citizens, are you prepared to admit that this is a slave republic, and that whatever territory it acquires becomes instantly slave soil? If that be the true interpretation of the Constitution, then, wherever the flag of this country goes, it carries slavery with it; into whatever new regions it is borne, it bears chains and manacles in its folds. From a doctrine so abhorrent to our sentiments, so treasonable to our history and traditions, there is no hope of rescue, but in the united mass of Democratic-Republicans.

It is darkest just before dawn. This is the darkest hour of the night. Never before has a doctrine been proclaimed, which not only no European nation, but no nation of Christendom, save only Brazil and our own, would now maintain. The disgrace has fallen upon us through our supineness and our divisions. Let us be supine no longer, and let us lay aside all minor divisions, that we may redeem our country, the country of our freedom-loving forefathers, from that curse, greater than slavery—that of loving, praising, and extending it.

The condition of Kansas demands your most attentive consideration. You see there the fruits of that policy of which the present national Administration is the defender and



promoter—a country opened to slavery that slavery might be sure to enter; a Legislature chosen by slaveholders, who did not live on the soil, and making laws which no freeman could bear; this Legislature and these laws upheld by the President and Congress; and the President now enforcing them, because he says he has no dispensing power! But how does it happen that this Legislature and these laws exist? Who are responsible for them? Who called them into being? The party which now has control of the General Government; the party against which we contend; the party which seeks to carry the State of New York at the coming election; and which would be emboldened to reopen the slave-trade, if it should succeed in bearing down the Democratic-Republicans.

When we say this, we have said enough to satisfy every friend of freedom, and every lover of good government, that our success now is scarcely less important than it was at the last presidential election. If we can hope ever to retrieve the losses which freedom has sustained, and is constantly sustaining, we must stand firm now, and show the State of New York as the immovable bulwark against the slaveholders' domination.

The other great evil which menaces us is official corruption. Official action is not infrequently affected by the hope of pecuniary advantage, and in some instances—very few it is to be hoped—there is reason to fear that money has been paid directly to official persons, for their votes or their influence. The mention of such a fact is enough to excite the indignation of every friend of republican institutions and of every honest man. Already the good name of our country has been injured by the stories which are current respecting the state of things at Washington, at Albany, and in the city of New York. There are jobbers in legislative grants, and other private schemes, hanging about the Capitol of the nation and the Capitols of the States, who solicit members of Congress and members of State Legislatures, and offer to the feeble-minded and the wicked unworthy inducements for their votes. These things, fellow-citizens, must not be allowed to last, for they sap the foundations of our institutions. Corruption must be destroyed, or it will destroy the Government.

That there should be men of such unspeakable baseness as to sell themselves as they sell cattle, is bad enough; but that such men should be able so to deceive the people as to reach places of trust, almost surpasses belief. One would think that an honest people would be sure to have honest representatives, but such is either the facility with which we are imposed upon, or such the vice of our plan of election, that we do find many of our representatives corruptible, and, what is more, we find sometimes that those who have been corrupted are re-elected.

Surely these things need only to be known to be corrected. There are two remedies: the first is the election of honest men; this would be certain and complete; the second—less certain and complete—is legislation. The legislative remedy which promises most success is, first, a different mode of legislation; and, second, penalties against what is called “lobbying.”

The only mode of legislation which ought to be known in our republican system is by general laws. Special legislation is opposed to our theory, and is the source of corruption. Our present Constitution inculcates most strongly the duty of general legislation only; and yet, in the last session, the Legislature passed eight hundred and thirteen statutes, of which only one hundred and six are general. The rest were purely special, and very many of them ought never to have been passed. Special acts are those chiefly from which pecuniary benefit is derived, and, therefore, the only ones in which there is any motive to corrupt a Legislature. Cease to pass special acts, and the services of “lobby agents” will be no longer sought, and the sources of corruption will fail.

And in those cases in which special legislation is resorted to, is it not possible to prevent the private soliciting of members? Why should it be any more proper to ask privately a member of the Legislature to vote for your bill, than to ask privately a judge to decide for your side of a controversy? It should not seem difficult to regulate to a considerable extent the soliciting of bills and to require that it should only be in public, before committees, and to punish all irregular and private applications. We commend this subject, first to the electors, in the hope that they will see to the election of honest repre-

sentatives, and will watch them when elected; and then to the Legislature, that they will adhere to general legislation whenever it be possible, and make an effort to prevent the irregular and private soliciting of bills.

Official corruption has been most flagrant in the city of New York, where a struggle has been carried on for several years between property-owners, seeking to maintain their rights, on the one side, and spoilers and plunderers on the other. The struggle is still doubtful. The next election will probably decide whether the city is to be given up to spoil, under the present municipal rulers, or whether it shall be saved by the election of a different class of officers. The Democrats, as they choose to call themselves, and as we are willing to call them in contradistinction from Democratic-Republicans, have already raised the taxes, in three years, from less than five to more than eight millions, and are now striving to continue the present corrupt city government, with the mayor, now in office, at its head; a man of whom it is difficult to say which most to condemn, his private or his public character. The elections of this autumn will decide whether the Democratic-Republicans shall drive this man from the post he has dishonored, or whether the Democrats shall retain him, with his subservient aldermen, councilmen, and confederates, to impoverish and despoil that devoted city.

Citizens of the State of New York, fellow-electors: The choice is before you. You are to determine whether the State shall be governed by a party calling itself Democratic, which believes in the inequality of men, and the right of one to buy and sell another; and which, in that part of the State now under its control, presents the worst instance of misgovernment which this country ever beheld; or by the Democratic-Republicans, who believe in the equality of men before the law, in the inalienable rights of every human being, in a simple but firm government, in the economical administration of affairs; and who will strive to secure the purity of the elective franchise and the purity of legislation.

## THE DANGER OF THROWING THE ELECTION OF THE PRESIDENT INTO CONGRESS.

Speech at Philadelphia, August 20, 1860.

FELLOW-CITIZENS: Four years ago, it was my fortune to address the citizens of Philadelphia upon the issues of the then pending canvass. It was, I thought, easy to foresee some of the results of Mr. Buchanan's election, and the event has justified my predictions. The demands of the slaveholders (let me always distinguish between the slaveholders and the South, for I am far from regarding them as identical) have increased, as it was foreseen they would increase, till they now insist that it shall be received as an undoubted article of constitutional law that every acre of Federal territory, wherever situated and however acquired, whether from the British Government, from Spain or Mexico, or from the feebleness of Central America, becomes, from the moment of its acquisition, slave soil; and that it is the duty of the Federal Government, with its overwhelming power, to protect, uphold, enforce the dominion of the master over the slave, even against the will of the local authorities and the voice of the surrounding people. It is also demanded, by no inconsiderable portion of the slaveholders, that the prohibition upon the slave-trade shall be taken off, that they may supply their plantations with slaves as they supply them with goods from the cheapest market.

The People's party of Pennsylvania was in the last Presidential canvass a compact, powerful party, united upon a great principle, and it would then have succeeded but for enormous frauds, of which the recent discovery and proof, and their extent and wickedness, have alarmed and disgusted the whole country. The bitter tree has borne its peculiar fruit. While we have suffered, our adversaries have not prospered. They



placed an Administration in power, of which the least that can be said is that it has distracted the country and torn its own party in pieces.

Meanwhile, your party here and everywhere in the country has remained united, and increased in strength. Every consideration which influenced it in 1856 must influence it now. The motives to this union and effort have become intensified in the intervening years. It should seem, therefore, unnecessary, and hardly profitable, to restate to our own members the various considerations of moral principle and public policy which have guided our conduct and stimulated our exertions, and which should continue to guide and stimulate them.

What I should rather wish to do is to put forth such considerations as might influence others to act with us. Not that I should care to address those who believe in the universality of slavery, and the right and duty of providing a Congressional slave code for the Federal possessions. Men of such opinions are beyond any arguments of mine, and I would not waste words upon them. But I would address myself to those who do not believe either of these revolting dogmas, and particularly to the more conservative portion of them. I desire to show them if I can, and I think I can, that it is most prudent, most conservative, safest, to support the Republican candidates. Of course I do not expect to succeed with those who think they find in the characters or principles of our candidates elements dangerous to the country; but I hope to convince every candid person that, if there be no real danger in the event of our success, there is great danger in the opposite direction.

Let us look for a moment at our candidates, both of them. Mr. Lincoln, the candidate for the first office, is a man of the purest character. No one has said, and I assume, therefore, that no one can say a word against it; but that in all his relations, social and political, and in all his transactions, professional or pecuniary, he is free from all exception, and beyond all reproach. He has lived a laborious life of half a century, often in the midst of great privations and great temptations; he has not sunk under the privation, he has not yielded to the temptation; he has risen, by force of labor and of will, from poverty and obscurity to competence and honorable fame.

Refined in his habits, simple in his tastes, unassuming in demeanor, all who know him praise him. I have heard many neighbors and acquaintances, of different parties, speak of him, and I have never heard one who did not speak of him with respect and confidence. He has not been corrupted by office. I believe he has held but one office, that of a member of Congress for a single term. He is fresh from the people. But he is none the less conversant with public questions. His speeches in Illinois, in that most memorable canvass against Mr. Douglas, show him to be a careful observer, a profound thinker, a close reasoner, and a sagacious statesman. I invite his bitterest opponent to look through them, and find one intemperate statement or an extravagant doctrine. They are distinguished throughout by good temper and moderate views. Such a man will administer the Government temperately, however firmly; he will give no provocation, nor run into any kind of extravagance. Every portion of the country will receive its due, so far as depends on him. No State, Southern or Northern, will find cause to complain of him, I am confident. He will treat the South and the North alike, and the East as if it were his own native West.

Our candidate for the second office, Mr. Hamlin, is also a man of irreproachable life and character. He has been much more in public than Mr. Lincoln, and has everywhere borne himself well, proving that every duty will be performed, and that no office is too great for him to fill.

With these men in office, the various interests confided to their care will be safe. They could not be in safer hands. But some of our opponents will say, "We know all of this to be true; the men are excellent, but their principles are dangerous." Which of their principles is dangerous? If, instead of invective and vituperation, you will specify any portion of the platform adopted at Chicago, any declaration of Mr. Lincoln or Mr. Hamlin, which from your heart you pronounce dangerous, I will undertake to find a warrant for it in the writings of Washington and Jefferson.

In sober earnest, the Republican party is at this moment the conservative party of the country. All the other parties, or fragments of parties, are advancing some new dogma un-

known to the fathers and earlier statesmen, or their candidates are committed to some heresy repugnant to the doctrines of our revolutionary age.

If I could reach the ears of our Southern brethren, and they would listen to me, I would say to them: "Be assured that the Republican party meditates no wrong to you; we would not meddle with any of your institutions; what you think best for yourselves, it is, in our opinion, your right to have and keep; we consider you neither our inferiors nor our superiors, but our equals; and we desire ever to treat you and to be treated as such. Do not mistake the clamor and extravagance of a few individuals for the judgment or designs of a great party. And, as an humble member of that party, I will venture to predict that the Republican Administration will not be selfish or proscriptive; that it will exercise its great powers as a trust for the whole country, and not for a part of it; that in the distribution of offices, and, what is of more consequence, in the recommendation and promotion of public measures, it will not discriminate against the South; and that, at the end of its term, it will receive from all the States the praise of good men for having administered the Government impartially, justly, honorably."

These preliminary observations open the way to an unembarrassed consideration of the duties of conservative men in present circumstances. Mr. Lincoln is the only candidate who can be elected by the people. He will receive the largest number of electoral votes. If he does not receive a majority, no man will receive them. If he be not elected, it will be because a plurality does not elect, but a majority is required. Whoever votes against him, therefore, must act in the hope either that in the House of Representatives a candidate having a less number of electoral votes will be elected, or that the election will fail, through an unsuccessful struggle, lasting from the second Wednesday of February to the 4th of March, and then that the Presidency will devolve on the person whom the Senate shall have selected from the two highest candidates to be Vice-President. This will be dangerous, for two reasons:

1. It will violate a rule, now generally adopted, that the



candidate having the largest number of votes, though less than a majority of the whole, shall be elected. This rule has been rendered necessary, in the progress of our political experience, from the frequency with which several candidates are brought forward, the embarrassment of repeated trials, and the importance of keeping the offices constantly filled, and, when filled, held by the persons who have the confidence of the largest number of electors. All that could ever be said against this practice was, that the officer elected ought to have from the beginning a majority of the people upon his side. No person, so far as I know, has ever thought it other than a grave misfortune that the candidate selected should have received from the people a less number of votes than his competitor, over whom he was preferred. To reject, therefore, Mr. Lincoln, if he should have less than an absolute majority, and put over him one who has less than he, would oppose the general practice, and offend the sense of justice of our people.

2. If there be danger in the election of one who has not the strongest hold upon the people, there is even greater danger from the struggle in the House of Representatives. We can not shut our eyes to the constitution of that body, to the lack of self-command which many of its members have already shown, to the passions by which whole classes of them are inflamed, and to the threatening combinations under the influence of which they will be certain in some degree to act.

The worst crisis through which it has ever passed will be as nothing to what we shall see now, if the election of President goes into the House. There are many persons and politicians at the South threatening and advocating forcible resistance to Mr. Lincoln's inauguration if elected by the people. If they are sincere, they will resist his election by the Representatives of the people. Among these advocates and threateners of resistance, Southern members of Congress are the loudest, if not the most determined. We may expect, therefore, at least, every sort of intimidation. Threats lead to defiance, and who can tell or dares to think of what may happen on the floor of the House before the 4th of March?

If there be no violence, may there not be corruption? The election will be in the palms of the hands of half a score



of members. The yearly revenues of this Government are from eighty to a hundred millions. The disbursement of this money, and the making of the contracts for which it is to be in a great measure disbursed, may be worth millions. I will not trust myself to describe what might occur under such circumstances.

There is a further possible danger. The Constitution declares that the House shall choose the President out of the three highest candidates, and the Senate the Vice-President out of the two highest. It is, however, very possible that there may not be *two* or *three* highest. There may be two or three equal in votes. Mr. Lincoln and Mr. Hamlin having the highest numbers, the rest may equal each other. Thus, suppose Mr. Lincoln's vote to be one hundred and fifty, and each of the others fifty-one, the Government would be at a dead-lock. Neither the Senate nor the House could make a choice. If you tell me that this is a very improbable contingency, I answer that it is, nevertheless, possible, and all the more probable, from the fact that it is proposed to form mixed electoral tickets in several States, making it not unlikely that the electors of the same State will vote for different candidates. This is not a purely imaginary danger; it was long ago foreseen by some of our most sagacious jurists; and I mention it to show toward what breakers they who aim to throw the election into Congress are causing us to drift.

The machinery for the election of President is, in truth, the weakest part of our Constitution—the weakest according to the original theory, and made still weaker by the practice under it. The theory of the Constitution was, that the electoral colleges were to be deliberative bodies, exercising their own judgment upon consideration of the fittest person to be President, instead of being, as they now are, merely recording officers, serving no other purpose than to register their votes according to previous instructions. A failure to elect was, therefore, less probable according to the theory than it has proved to be in practice.

The direction in which the votes are to be cast is now, in fact, determined at the general election in November, while, according to the theory, the whole period between the elec-

tion and the assembling of the electoral colleges might serve for comparing opinions and purposes, tending to produce an agreement of a majority upon a single person. The inequality of the States was, moreover, much less at the formation of the Constitution than it is now. An election by equal votes—that is, by the States counting each one vote—was not so distasteful to the more powerful States as it has since become. For these reasons, an election by Congress is attended with much more danger than was conceived by the founders of the Government and the earlier statesmen. What they thought of it, I will now proceed to show.

In the Convention which formed the Constitution, Mr. Gerry moved, on the 7th of September, 1787, “that, in the election of President by the House of Representatives, no State shall vote by less than three members, and where that number may not be allotted to a State, it shall be made up by its Senators; and a concurrence of a majority of all the States shall be necessary to make such a choice.”

Mr. Madison seconded the motion.

Mr. Reed observed that “the States having but one member only in the House of Representatives would be in danger of having no vote at all in the election; the sickness or absence, either of the Representative or one of the Senators, would have that effect.”

Mr. Madison replied that, “if one member of the House of Representatives should be left capable of voting for the State, the States having one Representative only would still be subject to that danger.” He thought “it an evil that so small a number, at any rate, should be authorized to elect. Corruption would be greatly facilitated by it. The mode itself was liable to this further weighty objection, that the Representatives of a *minority* of the people might reverse the choice of a *majority* of the *States* and of the *people*. He wished some cure for this inconvenience might be provided.”

In the Convention of Virginia, assembled to decide upon the acceptance or rejection of the Constitution, it was observed by Mr. Grayson: “The Executive is . . . to be elected by a number of electors in the country; but the principle is changed when no one has a majority of the whole number of electors

appointed, or when more than one have such a majority, and have an equal number of votes; for then the Lower House is to vote by States. It is thus changing throughout the whole. It seems rather founded on accident than on any principle of government I ever heard of. . . . The number of electors is equal to the number of Representatives and Senators, viz., ninety-one. They are to vote for two persons. They give, therefore, one hundred and eighty-two votes. Let there be forty-five votes for four different candidates, and two for the President. He is one of the five highest, if he have but two votes, which he may easily purchase. In this case, by the third clause of the first section of the second article, the election is to be by the Representatives according to the States. Let New Hampshire be for him; a majority of its three Representatives is two:

New Hampshire	.	.	.	.	.	3	2
Rhode Island	.	.	.	.	.	1	1
Connecticut	.	.	.	.	.	5	3
New Jersey	.	.	.	.	.	4	3
Delaware	.	.	.	.	.	1	1
Georgia	.	.	.	.	.	3	2
North Carolina	.	.	.	.	.	5	3

A majority of seven States is . . . 15

"Thus the majority of seven States is fifteen, while the minority amounts to fifty. The total number of voices, ninety-one electors and sixty-five Representatives, is one hundred and fifty-six. Voices in favor of the President are two electors and fifteen Representatives, which are in all seventeen. So that the President may be re-elected by the voices of seventeen against one hundred and thirty-nine. It may be said that this is an extraordinary case, and will never happen. In my opinion, it will often happen."

Mr. George Mason contended that "the mode of election was a mere deception, a mere *ignis fatuus* on the American people, and thrown out to make them believe that they were to choose him, whereas it would not be once out of fifty that he would be chosen by them in the first instance, because a majority of the whole number of votes was required. If the



localities of the States were considered, and the probable diversity of the opinions of the people attended to, he thought that it would be found that so many persons would be voted for that there seldom or never could be a majority in favor of one, except one great name, who, he thought, would be unanimously elected."

St. George Tucker, Professor of Law in the University of Virginia, and Judge of the General Court of that State, in the beginning of this century, after commending the mode of election by electoral colleges as tending to avoid turbulence, makes an exception "where the election may devolve upon the House of Representatives. Then, indeed," he continues, "intrigue and cabal may have their full scope; then may the existence of the Union be put in extreme hazard; then might a bold and desperate party, having command of an armed force and of all the resources of Government, attempt to establish themselves permanently in power, without the future aid of forms or the control of elections. Upon what principle, we may ask, is it that State influence is in this case permitted to operate in an inverse proportion to the ratio of population, and thus predominate over it? Upon what principle is it that that ratio which gives to all the citizens of the United States an equal voice in the election of President, in the first instance, shall give to the Representative of the citizens of Delaware, in the second, a weight equal to nineteen Representatives of the citizens of Virginia? Why, then, should the House of Representatives vote by States on this great occasion? It is, perhaps, susceptible of proof that, if the arts of corruption should ever be practiced with success in the election of a President, it will arise from this circumstance—the votes of a few individuals, in this instance, more than counterbalancing four times their number."

Such were the fears of our fathers. Time and experience have added to their force. The House of Representatives has already become a turbulent body, beyond anything dreamed of in the beginning of the Government. Intemperance in language is habitual, personal violence even has been practiced without receiving any punishment. Many of the members, we are told, carry concealed arms. They threaten and



abuse each other as if they had been collected together from the lowest classes of society. Into this body, thus constituted, and thus acting, it is proposed to cast the election of Chief Magistrate of thirty millions of people, divided into three or four parties inflamed against each other, and struggling for the gift of innumerable offices, and the yearly disbursement of a hundred millions.

If this appear to us an enormous risk, judging from the character of the body, and the interests at its disposal, much greater does it appear when we remember how this body has deported itself in past trials. There have been already two elections of President by the House—one of them in 1801, and the other in 1825. On the first occasion, Mr. Jefferson and Mr. Burr had an equal number of votes (there being then no distinction on the ballots between the two offices), and the election therefore devolved upon the House. The contest convulsed the country, and produced an amendment of the Constitution.

Some of the scenes, as they appear in the histories and correspondence of the time, it may be useful now to recall.

About the middle of December, 1800, the leaders of the Republican and Federal parties knew the result in the electoral colleges. Both sides were disappointed.

Mr. Jefferson had	.	.	.	.	.	73 votes.
Mr. Burr had	.	.	.	.	.	73 “
Mr. Adams had	.	.	.	.	.	65 “
Mr. Pinckney had	.	.	.	.	.	64 “
Mr. Jay had	.	.	.	.	.	1 vote.

The Senate and House were to meet (by law) on the 11th of February, 1801, to count the votes. Before meeting the Senate, the House adopted “eight rules to be observed in the choice of a President,” with the intent, as Mr. Randolph said (as a Federal expedient), to starve or worry the doubtful members into voting for Burr.

The first rule provided that, in case no candidate should have a majority of the electoral votes, the House would forthwith return to their own chamber, and immediately proceed to a ballot; “and in case, upon the first ballot, there shall not appear to be a majority of the States in favor of one of them,

in such case the House shall continue to ballot for a President, without interruption by other business, until it shall appear that a President is duly chosen."

4. "After commencing the balloting for President, the House shall not adjourn until a choice be made."

5. "The doors of the House shall be closed during the balloting, except against the officers of the House."

On the 11th of February the Senate and House of Representatives met, and the electoral votes were counted.

There being no choice, the two Houses then separated, and the House of Representatives proceeded to ballot in the manner prescribed by the Constitution, and under the rules they had adopted.

On the first ballot, eight States voted for Jefferson, six were for Burr, and two were divided.

The eight States which voted for Jefferson included all those south of New England except Maryland, Delaware, and South Carolina. The four maritime Northeastern States, with Delaware and South Carolina, voted for Burr. Vermont and Maryland were divided.

Two or three members were so ill as to be brought to the House on their beds. One, who was extremely ill, was attended in the House by his wife.

Twenty-eight ballots were had, at longer or shorter intervals, occupying the House till the next day, at noon.

The House remained in session nominally, without adjournment, for seven days; but after sitting out the first night, the resolution not to adjourn was substantially evaded by substituting a recess. During the next four days the actual sessions were very short, only five ballotings being had.

On the 13th of February the twenty-ninth ballot was had, and on the 14th the thirtieth, thirty-first, thirty-second, and thirty-third ballots, and on the 16th the thirty-fourth ballot.

"Ample time" (I am now quoting from Hildreth's "History") "had been allowed to Mr. Burr to bring over, if he could, any of the opposition votes, and that offers on both sides had been made to the doubtful members, subsequent developments left little doubt.

"A part of the evils which Hamilton had anticipated began already to be felt. The public mind was much agitated by the delay. Rumors

had been and continued to be circulated, charging the Federalists with the most desperate and revolutionary intentions. Jefferson himself, in the highest state of nervous agitation, wrote to Monroe that nothing but threats on the part of the opposition that the Middle States would rise in arms, and call a convention for framing a new Constitution, prevented the Federalists from passing an act to vest the Executive authority, in default of any election of President, in the Chief-Justice, or some other high officer.

"Had Congress been sitting in Philadelphia, instead of in Washington, it would have run no small risk of being invaded by a mob.

"On the 16th of February, thinking that the time had arrived for terminating the struggle in the exercise of a discretion intrusted to him by the other three Federalists with whom he co-operated, Bayard, of Delaware, called a general meeting of the Federal members, and, though some were still very reluctant to yield, it was finally agreed that Burr had no chance, and that Jefferson must be chosen."

The thirty-fifth ballot, taken at noon on the 17th, resulted like the former. After an hour's interval on the seventh day of the protracted sitting, the thirty-sixth ballot was had. Mr. Morris, of Vermont, was absent, and the two Maryland Federalists, Craik and Baer, put in blank ballots, thus giving two more States to Jefferson, which made a majority, and he was chosen.

The letters and diaries of the leading men of that time show how deeply the public mind was agitated.

The contest in reality lasted sixty days—from the middle of December, 1800, to February 17, 1801. During the greater part of that time, Hamilton was in New York, Jefferson at Washington, and Burr at Albany, a member of the Legislature.

On the 19th of December, Mr. Jefferson wrote to Mr. Madison in regard to the alleged threats of the Federalists, that "they openly declare they will prevent an election, and will name a President of the Senate *pro tem.* by what they say would only be a stretch of the Constitution."

On the same day, Gouverneur Morris, writing to Hamilton, observed: "It is supposed that Mr. Jefferson and Mr. Burr will have equal votes, and various speculations are made and making on that subject. At first it was proposed to prevent any election, and thereby throw the Government into the hands of a President of the Senate. It even went so far as to



cast about for the person. This appeared to me a wild measure, and I endeavored to dissuade those gentlemen from it, who mentioned it to me. It seems now to be given up. The object with many is to take Mr. Burr, and I should not be surprised if that measure were adopted. Not meaning to enter into intrigues, I have merely expressed the opinion that, since it was evidently the intention of our fellow-citizens to make Mr. Jefferson their President, it seems proper to fulfill that intention.

“The answer is simple, and on mere reasoning conclusive, but it is not conclusive to unimpassioned sentiment. Let the Representatives do what they may, they will not want arguments to justify them; and the situation of our country (doomed perhaps to sustain, *unsupported*, a war against France or England) seems indeed to call for a *vigorous practical* man. Mr. Burr will, it is said, come hither, and some who pretend to know his views think he will *bargain* with the Federalists. Of such *bargain* I shall know nothing, and, having declared my determination to support the constitutionally appointed administration so long as its acts shall not in my judgment be essentially wrong, my personal line of conduct gives me no difficulty; but I am not without serious apprehension for the future state of things.”

Hamilton was incessant in his efforts. He corresponded with Gouverneur Morris, Bayard, and others, almost daily.

Bayard held the vote of Delaware in his hand; and on January 7th wrote thus to Hamilton :

“With respect to the personal quality of the competitors, I should fear as much from the sincerity of Mr. Jefferson (if he is sincere) as from the want of probity in Mr. Burr. There would be really cause to fear that the Government would not survive the course of moral and political experiment to which it would be subjected in the hand of Mr. Jefferson.”

On the 15th of February, Mr. Jefferson wrote to Mr. Monroe, two days before a choice was made, as follows :

“If the Federalists could have been permitted to pass a law for putting the Government in the hands of an officer, they would certainly have prevented an election. But we thought it best to declare, one and all, openly and firmly, that the day



such an act passed, the Middle States would arm, and that no such usurpation, even for a single day, should be submitted to. This first shook them," etc.

Hamilton's feelings during the struggle were wrought to such a pitch, that he declared in a letter to Mr. Bayard, after the contest:

"It is believed to be an alarming fact that, while the question of the Presidential election was pending in the House of Representatives, parties were organizing in several of the cities, in the event of there being no election, to cut off the leading Federalists and seize the Government."

This was the first time the election of President was thrown into Congress. Let us go on to the second.

In 1824, General Jackson, Mr. Adams, and Mr. Crawford, were the candidates; and, though the first had the largest number, he had not a majority of the electoral votes. The House proceeded to choose one of the three, and chose Mr. Adams on the first day. Crimination and recrimination followed. Loud complaints were made that the candidate having the lesser number should be chosen, and a violent political struggle was the result. Mr. Benton gives the following account of this struggle in his "Thirty Years' View":

"The second Presidential election in the House of Representatives was after the lapse of a quarter of a century, and under the amended Constitution, which carried the three highest on the list to the House when no one had a majority of the electoral votes. General Jackson, Mr. John Quincy Adams, and Mr. William H. Crawford, were the three, their respective votes being 99, 84, 41; and in this case a second struggle took place between the theory of the Constitution and the democratic principle; and with eventual defeat to the opposers of that principle, though temporarily successful. Mr. Adams was elected, though General Jackson was the choice of the people, having received the greatest number of votes, and being undoubtedly the second choice of several States whose votes had been given to Mr. Crawford and Mr. Clay (at the general election). The Representatives from some of these States gave the vote of the State to Mr. Adams, upon the argument that he was best qualified for the station, and that it was dangerous to our institutions to elect a military chieftain—an argument which assumed a guardianship over the people, and implied the necessity of a superior intelligence to guide them for their own good. The election of Mr. Adams was perfectly constitutional, and, as such, fully submitted to by the people; but it was also a

violation of the *demos krates* principle, and that violation was signally rebuked. All the Representatives who voted against the will of their constituents, lost their favor, and disappeared from public life. The representation in the House of Representatives was largely changed at the first general election, and presented a full opposition to the new President. Mr. Adams himself was injured by it, and at the ensuing Presidential election was beaten by General Jackson more than two to one—178 to 83. Mr. Clay, who took the lead in the House for Mr. Adams, and afterward took upon himself the mission of reconciling the people to his election in a series of public speeches, was himself crippled in the effort, lost his place in the Democratic party, joined the Whigs (then called National Republicans), and has since presented the disheartening spectacle of a former great leader figuring at the head of his ancient foes in all their defeats, and lingering on their rear in their victories. . . . Finally, it was a caution to all public men against future attempts to govern Presidential elections in the House of Representatives.”

Such has been the experience of the House in the only instances in which it has been called upon to make choice of a President. Those were, however, its earlier and better days. A great change has come over the body in the six-and-thirty years which have passed since the latter of those occurrences. It then consisted of one hundred and eighty members. It has now two hundred and thirty-seven. No longer filled with the ablest and most considerate men of the nation, it has degenerated in self-control as much as it has fallen off in ability. Twice within the last six years it has found the greatest difficulty in electing its own Speaker. From the first Monday of December, 1855, to the second day of the following February, it remained without a head. A similar interval of disorder, only one day less in duration, occurred at the beginning of the present session. On the first occasion, one hundred and thirty-three ballottings were had before a choice was made; on the second, forty-four.

He must be a careless observer of what is passing in his own age, as well as an idle student of the history of past ages, who can think it safe to cast such a prize as the Presidency into such an arena, to be contended for during many days, and lost and won, according to the chances of intrigue, intimidation, endurance, and possible corruption and violence.

In the whole history of the world, you can not find the election of the chief magistrate of a great people by a single

body ever proving wise or safe. Neither in Rome nor in Venice, or Poland, was it other than a source of corruption, intrigue, violence, and misrule, leading to civil commotions and the final ruin of the state.

All this one might be willing to encounter, if it were necessary, in order to prevent a certain and greater evil, or to compass a certain good ; but, as no man can foretell which of the eight candidates will come uppermost in the scramble, the good is at the best most doubtful, and the supposed evil is the election of one of the purest, most thoughtful, and disinterested men of our time.

To you, then, gentlemen of all parties, or of no party, who take no further interest in politics than to seek the promotion of order, fraternal sentiment, moderate counsels, and honest government, I beg leave to address myself. While I believe that, of all the candidates, Mr. Lincoln is the safest, as I believe that he will be elected, and of all the parties that the Republican is the truest to the principles and the history of our country, I will suppose that you are of a different opinion, and that if you could exercise an unrestrained choice you would prefer another candidate and another party. But your choice in the present instance is restricted. *You must choose between Mr. Lincoln and the dangers and chances of a struggle in Congress, with its uncertain issues.*

All opposition to our candidate centers at last in this : to prevent his election by the people, not that the people may elect another, but that some one who has less of popular strength may be placed above him ; that this may be done by a juggle of thirty-three votes cast in a noisy, turbulent, and wildly excited body, where one man from Oregon shall have the same power as thirty-three from New York. It might or it might not happen that a respectable choice would be made ; that is uncertain ; but it is certain that *the process is not safe.*



## DEEDS, NOT WORDS.

From an address delivered at the great Union meeting held in New York, 1861.

THIS is not a time for words, but for deeds. Our Union is assailed; that Union which was created after so many years of patient labor, of common suffering, and of common glory. Our Constitution is defied; that Constitution which Washington, Franklin, Madison, Hamilton, and their compatriots made, and which has served us so well in peace and war. Our liberties are menaced; those liberties which we inherited from our brave and suffering fathers, and which we received as an inheritance to be transmitted intact to our children. The symbol of our country's strength and honor, that flag which our countrymen have borne over so many lands and seas, has been insulted and trampled upon. Our fortresses, arsenals, mints, custom-houses, hospitals, have been seized. The roads to our national capital have been obstructed, and our own troops, marching to its succor, have been molested and stopped. Every form of contumely and insult has been used toward us. The foundations of government and society are rocking around us. Truly, my fellow-citizens, this is no time for words—we must act, act now, and act together, or we are lost.

This is no occasion to inquire into the causes of this awful state of things. All hands, all hearts, all thoughts, should be concentrated upon the one great object of saving our country, our Union, our Constitution—I had almost said our civilization. If we fail in this great emergency, if we allow a single source of discord to intrude into our councils, if we do not give to our glorious land, in this hour of its peril, our substance, our labors, and our blood, we shall prove ourselves most degenerate children. A great conspiracy has been forming and extending for many years to overthrow this Government; and people have only now believed its existence. It



was something so monstrous as to be incredible until an armed rebellion overcame seven States, and is spreading over more. A military despotism has obtained control of eight million people, and is knocking at the gates of the capital. Therefore, arm yourselves, for this contest is to be decided by arms. Let every man arm himself. None capable of bearing arms can be spared. It is not thirty thousand that this State must get ready, but three hundred thousand! Arm yourselves by land and sea; prepare for the worst; rally to the support of the Government; give your counsel and your strength to the constituted authorities whom the votes of the people and the laws of the land have placed in power. Never give up! Never despair! Never shrink!

And from this darkness and gloom, from the smoke and flame of battle, we shall, with God's blessing, come out purified as by fire, our love of justice increased, the foundations of our institutions more firmly cemented, and the blessings of liberty more certainly secured to ourselves and our posterity. Every motive that can influence men is present to us this day—love of honor and love of right, the history of the heroic past, the vast interests of the present, and the future of all the millions that for ages shall inhabit this continent.

## ADDRESS AT THE MASS MEETING OF LOYAL CITIZENS AT UNION SQUARE.

NEW YORK, JULY 15, 1862.

THE war in which the United States are engaged is not a war of conquest, but purely of defense. We are fighting for that which we received from our fathers ; for the Union, which was freely entered into by all the parties to it ; for the Constitution, which is older than this generation, which was made, in part, by the rebel States, and which every rebel leader has oftentimes sworn to support. We did not resist till our forbearance was imputed to pusillanimity ; we did not strike till we had been struck ; and, when we took up arms, we sought only to retake that which had been taken from us by force, or surrendered by an imbecile or traitorous President and Cabinet.

The rebellion had no cause or pretext which was even plausible. Misgovernment by the Federal power was not even pretended, nor any just apprehension of misgovernment, for, though a President had been chosen whose opinions were hostile to the extension of slavery, the other departments of the Government were so constituted that no legislation hostile to the South could have been perfected. The rebels revolted, therefore, against a Government which themselves or their fathers had, of their free choice, created for them, whose powers they had generally wielded, and whose offices they had for the greater part filled.

What this rebellion was for is declared by the Constitution which the rebels immediately adopted for themselves, and to which they invited the adhesion of the loyal States. That instrument may be regarded as their manifesto. It is for the most part a copy of the Constitution of the United States, with these two important additions—the perpetual servitude of the African race, and the inalienable right of

each State to secede from the rest at will. Slavery and secession are the two corner-stones of the rebel Constitution, the differences between that and our own ; and, of course, the only causes and objects of the rebellion.

Whoever, therefore, either in this country or in Europe, sympathizes with the rebels, or abets them, must justify the taking up of arms and filling the land with distress and slaughter, for the establishment of the perpetual right of slavery, and the perpetual right of secession. The bare statement of the proposition, so far as slavery is concerned, should seem to be a sufficient argument. In this age of the world, under the influence of our Christian civilization, it seems incredible that any set of men should dare to proclaim perpetual human servitude as a fundamental article of their social compact, or that any other man should be found on the face of the world to justify or even to tolerate them. In respect to the assumed right of secession, the argument is short and conclusive. Our Constitution established a Government and not a league ; that was its purpose ; the aim of its founders to make it a Government indissoluble and immortal, was as clearly expressed in the language of the instrument, and of contemporaneous writings, as it was possible to express it.

That man must be most ignorant of American history and law who does not know that the idea of a league or partnership is wholly foreign to our constitutional system. The union between England and Scotland is as much a league or partnership as the union between New York and Virginia ; and when Englishmen talk of the right of Virginia to self-government, let them ask themselves if they think Scotland has a right to secede from England at will.

So much for the legal right. Now, for the political necessity. The secession of Louisiana and Florida from Pennsylvania and Ohio can no more be admitted, considered as a question of policy alone, than could the secession of Wales from England, or Burgundy from France ; nay, more, it would be possible for France to exist as a powerful empire, without a foot of the old domain of the Burgundian princes ; and England might be powerful and respected, though the Welsh in their mountains still maintained their independence. But such is the

shape of this continent, and the network of waters which flow through the Delta of the Mississippi into the Gulf of Mexico, that one part of the great valley can not secede from the other. Providence has written its eternal decree upon the rivers and mountains of our continent, that the Northwestern and the Southwestern States shall be forever joined.

But if it were possible to be otherwise—if several independent communities, without any national tie, could exist side by side in the great basin of our continent—they would be rivals, and from rivals would become enemies, warring with one another, seeking foreign alliances, obstructing one another's prosperity, and assailing one another's power. The great experiment of republican government would have failed; an experiment depending for its success upon the possibility of uniting the independent action of separate States in respect to the greater number of the functions of government, with the action of a national Government upon all matters of common concern.

If, as we believe, the fate of republican government in America is to determine whether a great country can be governed by any other than the monarchical form, with its concomitants of privileged classes and standing armaments; and, of course, whether this country of ours is to continue to be the asylum for the poor and the oppressed of all countries; there can be no greater question presented to any people than that now presented to us; none in which the millions of this continent, and of Europe, are more deeply concerned. If such a sacrifice were necessary, the thirty millions who now inhabit these States could do nothing so useful or sublime as to give themselves and all that they have, that they might leave this broad land under one free, indissoluble, republican government, opening wide its arms to the people of all lands, and promising happy homes to hundreds of millions for scores of ages.

We are persuaded that there has never been a struggle between authority and rebellion whose issues involved more of good or ill to the human race. We are fighting not for ourselves alone, but for our fellow-men, and for the millions who are to come after us. These are issues in the great war



of opinion, which began before the century opened, and which will be ended only when it shall be decided whether government is for the few or the many.

We do not war with monarchical governments or monarchical principles. They may be the best for some countries. The republican form of government is the one we prefer for ourselves, and for that, in its purity and its strength, we are offering up our substance, and pouring out our blood like water. We are contending for that scheme of government for which Washington and the rest of the fathers took up arms ; for the integrity of our country ; for our national existence ; for the Christian civilization of our land ; for our commerce, our arts, our schools ; for all those earthly things which we have been taught most to cherish and respect.

Such being the magnitude of the stake in this contest, can it be wondered at that we feel that all that we have, and all that we can do, should be given to our country in this its great hour of trial? If there be a man among us who does not feel thus, he should leave us. We can not endure the thought of a traitor in the midst of us. For ourselves, we are willing to make every sacrifice necessary to secure the triumph of the Government. It can have all the resources of twenty millions of people. All we ask of it is, that it shall use them quickly, vigorously, and wisely. Let us have no disunited counsels, no uncertain policy, no insufficient armaments, no paltering with rebellion. The crisis is most serious and imminent. The nation is not in a mood for trifling. It believes that the surest means of suppressing the rebellion are the best. It complains only of delays, vacillation, weakness. It wishes the strength of the nation to be collected, and, when collected, used so that not a vestige of revolt remain. We know that we have the men and the means ; we only demand of the administration that it do what it is bound to do, use them with singleness of purpose, with well-considered plan, under the lead of the wisest counsel and the most skillful command.

This rebellion is a matter between ourselves and the rebels. No person other than an American has anything to do with it. If another intrudes into it, we must regard and treat him as an enemy. And if any foreign Government, forgetting its

own duties, attempts to interfere in our affairs, the attempt must be repelled, as we are sure it will be repelled, with that firmness and spirit which become the American people and their representatives. If there be anything about which we are all agreed, it is the wisdom of our traditional policy, that we will not interfere in the affairs of other nations, nor allow their interference in ours. To the maintenance of this policy the nation is devoted, and the administration can count on the unanimous support of our people.

Forasmuch, then, as the actual rebellion and the possibility of foreign intervention make it necessary that the whole loyal people of this country should be banded together as one man, for the defense of all they hold most dear, we here pledge ourselves to each other, to Congress, and to the President, that, with all our resources, we will support the administration in the prosecution of this war, with the utmost possible vigor, till the rebellion is utterly overcome, and its leaders brought to merited punishment.

## SPEECH AT THE RUSSIAN BANQUET,

OCTOBER 19, 1863.

Neutrality—that solemn principle of law which teaches and enforces the obligations of duty and friendship between nations which are at peace with one another.

To this toast Mr. Field responded as follows: It has been said that, if a new dictionary were now to be published in England, another definition of neutrality would have to be given. Certain it is that much of what has taken place on the other side of the ocean during this unhappy war comports little with our previous understanding of the duties of neutrals. And yet strict neutrality between belligerents is enjoined as much by philanthropy as by national honor; for, while it protects national independence, it restricts the limits of war. It is thus a rule alike of justice and of prudence. It springs from principles which lie at the foundation of international law; that is to say, the independence and the equality of nations. But there is another rule which springs from the same principles, and which is as old and as strong as that of neutrality, and is sometimes confounded with it; that is, the duty of every nation to abstain from any interference with the internal concerns of another. To be neutral between two belligerents is to help neither; to make or help to make two belligerents out of the same nation is to interfere in its internal relations. If it be said that this is but to recognize and declare a fact, I answer that the nation itself, as it is equal and independent, is the sole judge of the fact. The relation of the different parts with one another is a domestic concern. To assume to recognize and declare relations between parts of a nation which that nation does not first recognize and declare, is, equally with the violation of neutrality, a departure from that courtesy and deference which are due from one nation to another. Both depend upon that public law of the world which is as old as governments and as eternal as equity.

No nation is so ancient or mighty as to be above it ; none so young or weak as to be below it. Each, as it takes its place in the family of nations, assumes it in all its plenitude. These rules the Government of this country has followed at all times and under all circumstances. Whatever may have been the sympathies of our people, whatever may have been the moral aspects of the foreign wars on which they have looked, and however much they may have desired the success of one party over the other, they have inflexibly refused to throw their power into the scale, or to allow any of their citizens to violate the neutrality which the Government enjoined. From the administration of Washington to the administration of Lincoln, through all the wars of the French Republic and the French Empire, through the struggles for mastery in Eastern Europe, through the great civil wars in Poland, in Hungary, and in India, we have steadily asserted the policy of non-interference, and maintained it in practice. And we have never resorted to the paltry evasion of doing secretly what we professed openly to avoid. What we said we meant, and what we meant we said. We have held the obligation to be paramount and universal. We complain of England and France, first for the proclamation or profession of neutrality, and then for the violation of the neutrality thus professed. This is not the place to enter upon the reasons which justify these complaints. The loyal people of this country have made up their opinions on both these subjects. They are convinced that England and France have wronged them in both respects, and are just as strongly convinced that Russia, whose naval officers are our guests to-night, has acted differently : has done us no injury ; has conformed her conduct to the solemn injunctions of the law of nations, in accounting us competent to manage our own affairs ; treating the established and recognized Government of the country as the only lawful belligerent, and holding no relations whatever with the rebels. It is impossible to mistake the settled convictions of the American people. They will never forget, through all the changes of future years, that in their mortal struggle the Czar has been true to them, and in the exercise of his great office has been inflexible in his adherence to the grand and salutary principles of public law.



And they will just as surely never cease to believe that the Governments of England and France have desired the disruption of the republic, and have hastened unjustly to lift the rebels into the condition of legal belligerents; have offensively professed neutrality between the lawful and the rebel forces, and, after all, have evaded that professed neutrality by every species of indirect assistance which it was possible to give short of engaging in hostilities. *These things will never be forgotten so long as Americans can read and remember. And, more than this, the men of this generation, who have smarted under these wrongs, will not rest until some of them are righted.* We see the ground fresh with graves, half of which would never have been opened but for the countenance which England and France have given to the rebellion; and, whether it shall be procured from their apprehension of the consequences, or their sense of justice, *reparation must yet be made, or the seed which has been sown in these three years will ripen into an iron harvest of future war, of which no man can foresee the end.*

## THE TELEGRAPH.

Speech at the Morse Dinner, December 27, 1863.

MR. CHAIRMAN AND GENTLEMEN: In the early days of the electric telegraph, a proposition was made that it should be called the Morseograph. I can not but think that that would have been a distinctive and appropriate designation; thus, in all future time, when the thing should be mentioned, recalling the history of its origin. But the name of the inventor is no secret, and the world will ratify the judgment we pronounce to-night that, as benefactor and discoverer, his name will be immortal.

If we were to measure the future of the telegraph by what it has already accomplished, we should predict for it an indefinite extension. Less than twenty-five years ago, the first line was built in the United States. Though it extended only from Washington to Baltimore, it was begun in doubt and completed with difficulty. Thence it stretched itself out first to Philadelphia and New York, then to other principal cities, and afterward along the great thoroughfares. On the other side of the sea it advanced from city to city and from one market to another.

At first laid with hesitation underneath the rivers, it was next carried beneath narrow seas, and at last plunged into the ocean and passed from continent to continent. Compare its feeble beginning with its achievement of to-day. Think of the uncertainty with which, after weary months upon dusty Maryland roads, the last link of that first line was closed, and then think of the exultation with which great ships in mid-ocean brought up from the bottom of the sea a cable lost two miles down, and the problem was forever solved, not only that an ocean-telegraph cable was possible, but that it could not be so lost as that it might not be found.

Standing in the presence of the great inventor, I am con-

strained to congratulate him upon the fullness of his triumph as he remembers the early effort, and contrasts it with the marvels of this night in this hall. That little instrument, no larger than the clock upon the chamber mantel, and making as little noise, is yet speaking to both America and Europe, and what it says will be printed before the dawn, and laid at morning under the eyes of millions of readers. Did I say before the dawn? It will meet the dawn in its circuit before it reaches the confines of Eastern Europe. In the opposite quarter, we know that the message which has just left us for the West will outstrip the day. Even while I have been speaking the message has crossed the Mississippi, passed the workmen laying the farthest rail of the Pacific road, bounded over the Sierra Nevada and dashed into the plains of California, as the last ray of to-day's sun is fading from the shore, and the twilight is falling upon the Pacific Sea.

It is, however, not alone its history which justifies us in predicting for the telegraph indefinite extension. Its essential character must sooner or later carry it to every part of the habitable globe. Of all the agencies yet vouchsafed to man, it is the most accessible and the most potent. While the machinery itself is simple and cheap, the element from which it is fed is abundant and all-pervading. It is in the heaven above, in the earth beneath, and in the water under the earth. You take a little cup and pass into it a slender wire, when lo! there comes to it a spark from air and water, from the cloud and the solid earth, which the highest mountains can not stop, nor the deepest seas drown, as it dashes on its fiery way, indifferent whether its errand be to the next village or to the antipodes. No other voice can speak to the far and near at the same time. No other hand can write a message which may be delivered within the same hour at Quebec and at Moscow. By no other means may you converse at once with the farmer of Illinois and the merchant of Amsterdam, with the German on the Danube and the Arab under his palm.

To the use of such an instrument there can be no limit but the desire of man to converse with man. If from this populous and opulent capital you would speak with any inhabitant

of either hemisphere, you have here an agent which may be brought to do your bidding. If any, however distant, desire to speak with us, they have these means at their command. How great will be the effect of all this upon the civilization of the human race, I do not pretend to foresee. But this I foresee, as all men may, that the necessities of governments, the thirst for knowledge, and the restless activity of commerce will make the telegraph girdle the earth and bind it in a network of electric wire.

The Atlantic, the most dangerous and difficult of all the seas, has been crossed. In the Pacific you may pass easily from island to island, till you reach the shores of Eastern Asia. There an American company will take it up and extend it from side to side of the central Flowery Land. And an English company is about to cross the straits which divide Australia from the elder continent. Indeed, I think that I declare not only what is possible but what will come to pass within the next decade, that there will be a telegraph-office wherever there is now a post-office, and that messages by the telegraph will pass almost as frequently as messages by the mail.

Then the different races and nations of men will stand, as it were, in the presence of one another. They will know one another better. They will act and react upon one another. They may be moved by common sympathies and swayed by common interests. Thus the electric spark is the true Promethean fire, which is to kindle human hearts. Then will men learn that they are brethren, and that it is not less their interest than their duty to cultivate good-will and peace throughout all the earth.



## SPEECH AT THE MASS MEETING OF MERCHANTS,

NOVEMBER 5, 1864.

Mr. FIELD presented the following Address and Resolutions :

FELLOW-CITIZENS: There is not a citizen of the United States to whom the election of next Tuesday is not a matter of great importance. But to you who stand in the gate of the continent, through which passes commerce with all the world, the importance of the contest is incalculable. The growth and prosperity of our city are due, in a great measure, to that Union of the States which began under Washington, and which has made us one nation under a strong government, capable of commanding obedience at home and respect abroad. That Union has been assailed by force; the principles that lie at its foundation have been contested by sophistry, and the loyal people of the land are now contending not only against the rebels in the field, but with their doctrines preached among ourselves; against that love of domination which would make slaves of all who labor with their hands, and which was the exciting cause of the rebellion; against that heresy of secession, which was the pretext for the resistance of States when they were defeated at the elections, and is now the pretext of their supporters and abettors for "an immediate suspension of hostilities" to overcome that resistance; and against the evil passions which slavery and treason have excited, and which stealthily destroy unoffending merchants and fishermen on the seas; which send ruffians on board passenger-ships, disguised as passengers, that they may fall upon the unguarded to kill and despoil; which send cowards across the borders, disguised as visitors, that they may rob and murder our unsuspecting people; and which are even now engaged in conspiracies to set fire to our chief cities. The result of the contest in which the

nation is now struggling will show whether we have a stable government, capable of maintaining itself as our fathers supposed, or whether our political society must be resolved into its elements. The real ultimate question which this war is to solve is, whether the United States of America constitute a nation or a confederation of nations; whether New York, Georgia, and California are parts of one nation, or three nations united by a federal bond dissoluble at will. There can be no permanent union without a common government, and no government without the power of coercing refractory members, whether individuals or States. If there be any loyal supporters of General McClellan, their conduct is strangely at variance with their opinions. In the midst of a war which the rebels began, and which they are fighting under the twin banners of slavery and secession, the supporters of McClellan, falsely calling themselves Democrats, demand an immediate suspension of hostilities with a view to an ultimate convention of the States. To ask a suspension of hostilities from rebels in arms is to confess either that we have not the right to coerce rebellious States, or that we have not the ability to coerce them. To adopt the former alternative, is to confess ourselves secessionists; to adopt the latter, is to confess ourselves cowards. To go for a convention of the States, is to go for a change of the Constitution; to offer it to the rebels, is to offer such a change as they demand, and that change is an acknowledgment of both slavery and secession. Therefore, fellow-citizens of New York, if you think that your prosperity and honor do not require the permanent Union of the States, you can pronounce for McClellan and the platform of principles which the Chicago Convention laid down for him and his followers. You are told that Mr. Lincoln has made mistakes in his administration of the national Government. Let that be granted for the sake of the argument; it is no reason for throwing away a national Government altogether. It is rather a reason for all true men to stand together, and, by their counsel and co-operation, correct whatever mistakes may have been made. It is not so much Mr. Lincoln as Mr. Lincoln's cause that we wish you to support; it is not so much in his defense as in the defense of the country, that we ask your

suffrages. It is not so much for his honor as for the honor of the flag of our common land, that we urge you to labor. They may complain of his administration as they will, they can not say that he has ever despaired of the republic, or has ever thought of "a suspension of hostilities," so long as traitors in arms are holding our fortresses, flouting their rebel banners in our faces, burning our merchant-ships, making raids over the borders, and denying food and shelter to our soldiers whom the fortunes of war have placed in their hands. You are told that the nation has already contracted a debt of three thousand millions. We need not tell you that this is a gross exaggeration made after the manner of the enemies of the Government; but we answer further that it is better to have a national debt of five thousand or ten thousand millions, than not to have a nation at all! We need not tell you who they are that support McClellan. You know them well yourselves. That some of them, though misguided, are well-wishers of the country, we will not deny. But there are others, about whose wishes and designs and the evil nature of them, there can be no mistake. You know that at the beginning of the war one of their present leaders, then mayor of this city, proposed that it should itself secede from both the Union and the State, and declare itself a free city—a proposal which would reduce it to the position, and in a few years to the size, of Hamburg; and which may serve to show you upon what a tempestuous sea of theories you may be tossed if you once swing away from the moorings of the Constitution. The same man sent to the Governor of Georgia his apology for the stoppage of arms on their way to the rebels, indicating, it should seem, that "the ways of the men of peace" are to give arms to the rebels, and to take them from ourselves! You know also that later in the war others of the "Democratic leaders" sought interviews with Lord Lyons; that they then declared to him "the plans and hopes of the Democratic party"; that they gave him to understand that "the subject uppermost in their minds" was "foreign mediation" between the North and the South; that they desired "to put an end to the war, even at the risk of losing the Southern States altogether"; and that, "if their own party were in power, they would accept an offer of media-



tion.” You know, further, that the presses which are the advocates of McClellan are ever belittling the successes and magnifying the reverses of the national arms. Union men of New York, when you go to the polls on Tuesday next, remember that every disunionist among us is for McClellan. Merchants of New York, remember that every repudiator of the national debt is for McClellan. Mechanics of New York, remember that they who stigmatize your employment as base, and your position as degraded, have rebelled against your Government, and that the supporters of McClellan are for making terms with them before they have submitted. All you who labor with your hands for your daily bread, remember that they who claim that the laborer should be a slave, and that he who employs him should own him, have rebelled against your Government; and that the supporters of McClellan are for conciliating them before they have yielded to its authority. All you, of whatever calling, who have fathers, brothers, or sons on Southern fields, or in Southern graves, remember that the supporters of McClellan are for “an immediate suspension of hostilities” against those who have slain the dead, and who, with bloody hands, still defy the living heroes who are struggling and suffering beneath your flag to maintain the priceless good of a free and united country, stronger than traitors, for yourselves and your posterity.

*Resolved*, That the present is not a contest between parties in their ordinary sense, but between unconditional Unionists on the one hand, and disunionists with conditional Unionists on the other.

*Resolved*, That the maintenance of the Union, in the plenitude of its authority, over all the States and all the inhabitants thereof, is one of the highest duties of American citizens; as without it there can be neither assured freedom for the people nor permanent peace between the States.

*Resolved*, That while every rebel in arms and every sympathizer with rebellion, who has not the courage to take up arms, every disunionist and every repudiator desires the election of McClellan, it becomes the duty of all citizens to array themselves on the other side to prevent his election.

*Resolved*, That between Mr. Lincoln, with the Baltimore platform, and General McClellan, with the Chicago platform, no loyal citizen should hesitate in his choice; since the former represents an undivided country, under a Government capable of maintaining its integrity, and the latter represents a country which either can not or ought not to maintain itself by force of arms against an armed rebellion.



*Resolved*, That we exhort all electors of this great city to exercise their right of suffrage on Tuesday next. No citizen can be an indifferent spectator of such a contest as that in which we are now engaged, and because the election of General McClellan, as he now stands before the country, would be a great public calamity, it is the duty of all good citizens to vote for Mr. Lincoln, even of those who do not approve all the acts of his administration; for his bitterest enemies can not deny that he has honestly endeavored to do his duty to the whole country, and that he is now the representative of our cause, our people, and our nationality.

*Resolved*, That as the commerce of New York is indebted for its extraordinary development to the Union of the States under a common Government, the merchants of this city are ready to make any sacrifices that may be necessary to uphold that Union, and the Government by which it is maintained; and they pledge themselves to their fellow-citizens, here and elsewhere throughout the country, that no depredations upon their commerce, and no interruption of their business, shall make them truckle to traitors, or swerve from the most loyal support of the Union, the Constitution, and the laws.

# MEMORIAL ADDRESS AT THE DEATH OF WILLIAM CURTIS NOYES.

DECEMBER 30, 1864.

At a meeting of the Bar, on the death of Mr. Noyes, Mr. Field, on seconding the motion to adopt the resolutions, said :

MR. CHAIRMAN : William Curtis Noyes, our deceased friend and brother, was born at Schodack, in the county of Rensselaer, on the 19th of August, 1805. His parents were in such moderate circumstances that he had not those advantages of early culture which were the lot of most of his professional brethren. While yet a lad of fourteen he was taken into a lawyer's office in his native village. His parents soon after removed to the county of Oneida, where he entered the office of Henry R. Storrs, a worthy teacher of a worthy pupil. In 1826 he was admitted an attorney, and in the usual course came to the degree of counsel. It was not long before he made himself known, and, while he was yet under the age of thirty, he was appointed the district attorney of the county. This was a particular compliment, since the county of Oneida, like the counties of Albany and Dutchess, has always been distinguished for its eminent lawyers.

In 1838 Mr. Noyes removed to this city. Here he rose by gradual process to that distinction and honor in which he died.

His great characteristic was skillful, painstaking research. Every one who has been associated with him in the conduct of cases knows that he brought to consultations a memory full of precedents, and when the argument came on there was a careful analysis of the facts, and an affluence of learning applicable to them, which left little for others to supply.

The lesson which we may learn from his life is, that the most solid professional fame is the result of slow advances. The massive structure which rises high into the air rests upon

foundations which are sunk deep into the earth, and is built up, stone carefully laid upon stone, till it appears at last in grand proportions and perfect symmetry. So it is with the fame of a great lawyer. It does not come from one great effort, nor from a few successful cases, not from flashing wit, nor from brilliant rhetoric, but from careful study, patient thought, and ripe experience.

It was my fortune to be often associated with Mr. Noyes, but there were two occasions in which we were much together, outside of professional life, to which I ought to allude. One was the Peace Conference of 1861, and the other the Code Commission. In the Peace Conference, Mr. Noyes and myself stood on almost every question firmly together. I mean, of course, to abstain from all allusion to anything partisan in character, or personal to myself; but I will say for him that he foresaw the terrible conflict that was impending, and, while he braced himself strongly to meet it, he sought to avoid it by every means short of a surrender of what he believed to be the principle of eternal and immutable justice.

The present Code Commission was created by the Legislature of 1857. My friend who has just presented the resolutions for the consideration of this meeting, Mr. Noyes, and myself, have been engaged on the laborious but almost thankless task for these nearly eight succeeding years. Our last conference had been had, our work was ended, all but the revision of the sheets from the press, when our comrade departed, leaving us, in mournful memory of him, to lay before the Legislature the record and the result of our labors. Our friend and brother, a week ago yesterday, was moving among us with firm step, in the fullness of all his faculties; the next morning he was stricken by the unseen hand; his eyelids fell, never to be lifted again; his hands sank heavy by his side, and his mind lost all consciousness of mortal things. Life, however, clung to the body till the Sabbath came, and then, at the hour when the morning chant went up of the Christmas hymn, his spirit returned to the bosom of its Maker. On the third day after, we, his brethren, looked for the last time upon his face as he lay in his coffin covered with flowers, under the dome of his library, surrounded by the books which were

the witnesses and helpers of his studies; thence we followed him to the narrow house appointed for all the living; and here we are, within the week from the day when he was stricken down, to record our testimony to his worth and our regret for his departure.

“For man walketh in a vain shadow, and disquieteth himself in vain.”



## MILITARY GOVERNMENT IN THE SOUTH.

Brief submitted to the Supreme Court of the United States in the case of the State of Georgia against Ulysses S. Grant, George G. Meade, Thomas H. Ruger, and Charles F. Rockwell, 1868.

THIS is a bill in equity of the State of Georgia, brought against four defendants, who have taken possession of her Capitol, Treasury, and railway, and a large sum of money belonging to her. The bill asks for an injunction against a continuance of the wrong, and for an account of the money taken, and of the profits of the railway received, by the defendants.

The question is one of property, and the circumstances are so extraordinary as to afford good cause for equitable relief on several grounds: first, for an account of money taken from the complainant, and of profits received from the railway; second, for preventing a multiplicity of suits; and, third, for staying trespasses and wrongs which would otherwise be irreparable.

To obtain an account, and to prevent a multiplicity of suits, are familiar reasons for the interposition of courts of equity. Story's Eq. Juris., §§ 66, 441, and cases there cited. And in respect to trespasses and wrongs, it may almost be said that the courts of equity had their origin in the need of protection against combinations too powerful for the courts of law.

It was the influence of the great lords, the number of their armed men and retainers, and the means of intimidation which they might exercise upon parties, courts, and juries to the oppression of the suitor, that led him to the Chancellor for relief. The following instances of ancient suits are found on the "Calendars of Chancery." They all set forth wrongs

cognizable at common law, which could not be there remedied by reason of the power or influence of the defendants :

Hauley *vs.* Tresilian, p. iii. Goddard *vs.* Ingepenne, p. ix. Tyrell's Case, p. xxi. Midylton *vs.* Cotyngnam, p. xx. Appleton *vs.* Aleyn, p. xxxi. Abbott, etc., *vs.* Stanley, p. xxxiii. (Calendars; London, 1827.)

In modern times it has been repeatedly held that a court of equity will enjoin a trespass which would be ruinous and irremediable. 1 Bro. C. C., 588. 6 Vesey, 147. 7 Vesey, 307. 10 Vesey, 290. 17 Vesey, 128. 18 Vesey, 184. George's Creek Co. *vs.* Detmold, 1 Md. Ch., 371. Jerome *vs.* Ross, 7 Johns, Ch., 331. Story, Eq. Jur., § 929.

So far, then, as appears upon the face of the bill, this case is proper for this court, and an injunction should issue. But, as the defendants will show that they are acting under certain acts of Congress, commonly called the Military Reconstruction Acts, it is proper for us to show that these do not afford a justification.

As in most controversies, so especially in those upon which legal rights depend, it is important to separate the point in dispute from every other. If we would judge aright, we must lay aside all considerations but those which belong to the question to be determined. We must detach the essential from the unessential, and the principal from the incidental, excluding as far as possible all those topics which turn aside the judgment, that the mind may see the subject distinctly, examine it calmly, and judge it by reason alone, without prejudice and without passion.

This does not exclude all thought of the greatness of the subject, and the responsibility which attaches to its decision, and this thought should lift the mind above the strifes of the hour, into a serener air, with a wider horizon.

The defendants are represented in this court by counsel deputed by the Secretary of War. The defense rests upon the military statutes to which I have referred.

There are three of them : one passed March 2, 1867 ; the second, a supplementary act, passed March 23, 1867 ; and the third, a further supplementary act, passed July 19, 1867. The first begins thus : " Whereas no legal State governments

or adequate protection for life or property now exist in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas, and whereas it is necessary that peace and good order should be enforced in said States until loyal and republican State governments can be legally established, therefore, Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that said rebel States shall be divided into military districts, and made subject to the military authority of the United States as hereinafter provided"; and after providing for the assignment of an officer of the army to the command of each district, the act proceeds in the third section thus :

"And be it further enacted, that it shall be the duty of each officer assigned as aforesaid to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals; and to this end he may allow civil tribunals to take jurisdiction of, and to try offenders, or when in his judgment it may be necessary for the trial of offenders, he shall have power to organize military commissions or tribunals for that purpose, and all interference under color of State authority with the exercise of military authority under this act shall be null and void."

The supplementary act of March 23, 1867, is not material to the present inquiry.

The first, second, and tenth sections of the supplementary act of July 19, 1867, are as follows :

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That it is hereby declared to have been the true intent and meaning of the act of the second day of March, one thousand eight hundred and sixty-seven, entitled "An act to provide for the more efficient government of the rebel States," and of the act supplementary thereto, passed on the twenty-third day of March, in the year one thousand eight hundred and sixty-seven, that the governments then existing in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas were not legal State governments, and that thereafter said governments, if continued, were to be continued subject in all respects to the military commanders of the respective districts, and to the paramount authority of Congress.



SEC. 2. And be it further enacted, That the commander of any district named in said act shall have power, subject to the disapproval of the General of the Army of the United States, and to have effect till disapproved, whenever in the opinion of such commander the proper administration of said act shall require it, to suspend or remove from office, or from the performance of official duties and the exercise of official powers, any officer or person holding, or exercising, or professing to hold or exercise any civil or military office or duty in such district, under any power, election, appointment, or authority derived from or granted by or claimed under any so-called State or the government thereof, or any municipal or other division thereof; and upon such suspension or removal such commander, subject to the disapproval of the general as aforesaid, shall have power to provide, from time to time, for the performance of the said duties of such officer or person so suspended or removed, by the detail of some competent officer or soldier of the army, or by the appointment of some other person to perform the same, and to fill vacancies occasioned by death, resignation, or otherwise.

SEC. 10. And be it further enacted, That no district commander or member of the Board of Registration, or any of the officers or appointees acting under them, shall be bound in his action by any opinion of any civil officer of the United States.

The first and principal question hinges on the preamble to the original act, and the enactments which I have just quoted.

The argument for the defendants is this: The preamble is true, and the enactments are justified by the preamble. We deny both propositions. We say that the preamble is not true; but, if it were, the conclusion does not follow. Here are the issues, strictly defined, and to their consideration let us first address ourselves.

It seems most convenient to reverse the order of the propositions, and to discuss the latter first, for if the conclusion does not follow from the premises, the court need hardly trouble itself with them. I shall, however, not only resist the conclusion, but, when I have done that, I shall dispute the premises.

Let me first ask attention to the proposition that, because "no legal State government, or adequate protection for life or property, now exists" in the State of Georgia, therefore that State can be placed by Congress under absolute and universal martial rule. Where is the authority of the Government of the nation for taking upon itself the government of a State,



however disordered and anarchical, and carrying on that government by the soldiery? We know that whatever power is possessed by Congress, or any other department of the Federal Government, is contained in a written Constitution. Within its few pages are contained, either in express language or by necessary intendment, every power which it is *possible* for the Federal authorities of any kind to exercise under any circumstances. Show me then, I say, the power to erect this military government. You can not find it *expressed* in any one of the eighteen subdivisions of the eighth section of the first article—that section which contains the enumeration of the powers of Congress. If it is *implied* in any of them, tell me in which one. I can not find it. You can give me no answer. I infer, therefore, and have a right to assert, that, as there is not one of these enumerated powers which contains any such express authority, so there is not one in which it is implied.

Turn, then, to the fourth section of the fourth article, that which declares that “the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion, and on application of the Legislature or of the Executive (when the Legislature can not be convened), against domestic violence.”

Is a military government here sanctioned? Certainly it is not *expressed*. Is it *implied*? Supposing, for the sake of the argument, that the United States, uninvited by its Legislature or Executive, can go into a State for the purpose of repressing disorder, or violence, or of overthrowing an existing State government on the ground that it is not republican, I deny that they can introduce a military government as the means to such an end. To avoid misapprehension, I carefully distinguish between the use of military power in aid of the civil and in subordination to it, and military government. The two systems are opposed to each other. In one case the civil power governs, in the other the military. In one, the military power is the servant of the civil, in the other it is the master. My proposition is, that a military government can not be set up in the United States for any of the purposes mentioned, and the reason is this: *military government is prohibited by the Constitution*. Not disputing the proposition

that Congress may pass all laws necessary or proper for carrying into effect any of the express powers conferred upon any department of the Government, and that Congress is in general the judge both of the necessity and the means, the proposition is to be taken with this qualification or limitation: that is, that the means must not be such as are prohibited by other parts of the Constitution. A lawful end, an end expressly authorized by the Constitution, can not be obtained by *prohibited means*.

This proposition should seem to be beyond dispute. Let us devote a few moments to its examination. The framers of the Government could not foresee all the exigencies which might arise in the future, and, therefore, after expressing the great ends for which the Government was formed, and the powers conferred upon it, they meant to leave the choice of the means to the discretion of Congress; but fearing that, in seasons of excitement and peril, that body might be tempted into measures not compatible with civil liberty, or consistent with the rights of the States or of the people, they inserted various express prohibitions in the original instrument, and the number was greatly increased by the subsequent amendments. Thus, in the ninth section of the first article, the one immediately following the list of granted powers, is a series of prohibitions, seven in number, and among them that relating to the suspension of the privilege of *habeas corpus*, prohibiting it, "unless when in cases of rebellion or invasion the public safety may require it"; and another relating to bills of attainder, and *ex post facto* laws, prohibiting them altogether. Stopping for a moment to consider these clauses of the original instrument, before going into the amendments, we see clearly that in the choice of means for carrying into execution any of its powers, Congress could not pass an act of attainder, or an *ex post facto* law, or, except in cases of rebellion or invasion, suspend the privilege of *habeas corpus*, however great might be the exigency or the peril, and though not only Congress, but the great majority of the country, should think these means the most appropriate, the most sure, and the most speedy for meeting the exigency or avoiding the peril.

Passing, then, to the amendments, we find eleven articles,

every one of which contains a prohibition of the use of particular means to obtain a permitted end. There were else no need of the amendments. If the end was not permitted, Congress could use no means whatever for its attainment, and it was only when the end was lawful, and Congress came to the choice of means, that the prohibitions were needed. The manifest design was to prohibit the particular means enumerated in the amendments, however desirable might be the end. Among these prohibitions are the following: That Congress can not abridge the freedom of speech or of the press; can not infringe the right of the people to keep and bear arms; can not subject any person not in the military service to answer for crime, but upon the previous action of a grand jury; can not bring an accused person to trial but by a jury; and can not deprive any person of life, liberty, or property without due process of law. Therefore, in the choice of means for obtaining an end, however good, Congress can not authorize the trial of any person, not impressed with a military character, for any crime whatever, except by means of a grand jury first accusing, and a trial jury afterward deciding the accusation.

This prohibition is fatal to the military government of civilians wherever, whenever, and under whatever circumstances attempted. Such a government can not exist without military courts, military arrests, and military trials. The military government set up in Georgia could not exist a day without them.

Thence it follows that even if Congress had authority to take upon itself the government of a State, this government could not be a military one; and for this reason, if there were no other, the whole scheme of these military reconstruction statutes fails, and the statutes themselves are unconstitutional and void; and if the statutes are void, all acts done under them are illegal, the seizure of the property of Georgia among the rest.

It will be observed that I have argued thus far without referring to the case of Milligan, decided by this court more than a year ago. No doubt I might have saved myself labor by citing that case in the beginning. But I thought it might



be well to state the argument anew, and then fortify myself by the authority of that great judgment—a judgment which has given the court a new title to the respect of the world, and will stand forever as one of the bulwarks of constitutional freedom. It is true that the judgment did not in terms embrace the rebel States, for the discussions at the bar, as well as the opinions from the bench, appear to have been intentionally kept clear of their disturbing influence; but it is, nevertheless, to be observed that the principles which are there enunciated are universal in their application. Among other things, it was adjudged that “the guarantee of trial by jury contained in the Constitution was intended for a state of peace, and is equally binding upon rulers and people at all times and under all circumstances”; and also that “neither the President, nor Congress, nor the Judiciary can disturb any one of the safeguards of civil liberty incorporated into the Constitution, except so far as the right is given to suspend in certain cases the privilege of the writ of *habeas corpus*.”

The next proposition is equally conclusive with the first, that even if the seizure of the property of the State by military force were not a part of the scheme of military government, it would stand prohibited by that provision to which I have referred, by which the Federal Government is prohibited from depriving any person of property without due process of law. Person in this connection includes a corporation, State, municipal, or private. Military seizure or execution is not due process of law. The most violent partisan, the wildest dreamer, has not yet gone so far as to pretend that it is.

If, therefore, it were conceded that Congress could, in some possible circumstances, take upon itself the government of a State, it is certain, first, that it could not govern by the army; and, second, that it could not empower any persons, military or civil, to seize the property of a State without due process of law.

If it be said that Georgia is not a State, and therefore the argument does not apply, I answer not only that Georgia is a State, as I shall endeavor to show hereafter, but that if she be not a State, she is, nevertheless, within the limits of the



United States, and that the prohibitions to which I have referred are as applicable and efficient in the Territories, and in every part of the national domain, as in the State of New York. The guarantees of the Constitution extend over every foot of soil where the flag of the country floats, throughout all the States, and in this District, in the Territories, in far-off Alaska. So it has been held in this court. Whether, therefore, there be or be not a "legal State government or adequate protection for life or property" in Georgia, Congress can not intervene by the establishment of a military government, nor can it take possession of the State property by military power without the authority of process from the legal tribunals.

This is the first part of my argument, and here, as I think, the whole argument might end; for if military government be a thing prohibited by the Constitution, and military seizure be not due process of law, we need go no further, nor trouble ourselves to inquire whether Congress has judged rightly in its reasons for intervention. It is the particular kind of intervention, that is to say, intervention by military power, that I have been objecting to; and if I have shown that to be inadmissible and unconstitutional, it matters little whether the reasons for intervention put forth in the preamble be sufficient or insufficient, or whether any other reasons have been, or could be, advanced for the interference of Congress in the government of Georgia.

But I will now proceed a step further, and supposing, for the sake of the argument, that a military government, or a military seizure, is not a prohibited, but a rightful, constitutional means of intervention, I submit that the preamble furnishes no reason for any kind of intervention whatever, and that, for two reasons: first, because it is not true, in a constitutional sense; and second, because, if true, it is not a constitutional reason for intervention.

It is not true in a constitutional sense. Of course, I am not going into any question of personal veracity, nor into questions of fact, except such as the court may take notice of judicially. The preamble asserts as facts, first, that there is no legal State government in Georgia; and second, that

there is no adequate protection for life or property. These two asserted facts are separable and separately stated. There may be a legal State government, though that government may not fulfill, and may not be able to fulfill, all its duties for the protection of life and property. It is most convenient to consider these assertions separately.

Was there, or was there not, on the 2d of March, 1867, a *legal State government* in Georgia? This inquiry involves another, antecedent to everything else, which is, whether the declaration of Congress is conclusive upon this court, or in other words whether you are at liberty, after this declaration, to make for yourselves inquiry on the subject, or whether you must accept the declaration as conclusive, whatever may be your own knowledge or information. This question may, perhaps, best be answered by supposing a case. Suppose an act of Congress passed to-morrow, with a similar preamble, concerning the State of Massachusetts, would you accept it as absolute verity? If it declared that, whereas no legal State government exists in Massachusetts, therefore it be made a military district, and subjected to the military power of the United States, just as Georgia is subjected by the act in question, and the commanding general of the district were to seize the ancient State-House, Faneuil Hall, and the State Treasury—that Treasury which has never yet been dishonored by a protest, and which has paid its debts in gold during all these years—would you be obliged to repel the old Commonwealth if she came here by bill to enjoin by the peaceful process of the law the spoliation of her treasury and her monuments? Would you tell her that, though you do not see why she has not a legal State government, Congress has decided otherwise, and that is sufficient for you? I am supposing an extreme case; but an extreme case is a good test of a universal principle. If, as a principle universal in its application, the declaration of Congress is conclusive upon the other departments of the government, then in the case supposed of Massachusetts it would prevail. If the principle is not universal, then there are cases in which this court could inquire for itself, notwithstanding the declaration of Congress. The true rule I apprehend to be this: The court will take judicial notice of

the fact of an existing government in every State of the Union; such a government will be presumed to be legal till it is shown to be illegal; the declaration of Congress may be one of the sources of evidence which enter into the case, but not the conclusive or the only one. If there be two rival governments in a State, Congress may have the right to decide between them, and certainly must decide which is to be represented in Congress, and that decision may be binding; but that is a very different thing from asserting that no government whatever exists, or that an existing government is *de facto*, and not *de jure*. The authority to *declare* a fact is only coextensive with the right to *decide* it; or, in other words, the declaration has no force, except as a decision. The question, then, is reduced to this: has Congress authority to decide that the existing government of Massachusetts, or of any other State, is not a legal government? To this question there should seem to be but one answer. No power is given Congress to interfere with the government of the States any more than power is given the States to interfere with the government of the United States. The only authority conferred upon the United States in this respect is that they shall guarantee to each State a republican form of government. But the preamble does not deny that Georgia has a government republican in form. That she has government, is stated more than once in these acts of Congress: it is there called an existing government; and, while it is pronounced not to be *legal*, is nowhere pronounced not to be *republican*.

Having shown, as I trust, that the declaration of Congress is not conclusive upon this court in respect to the existence of a legal State government, little need be said respecting the conclusiveness of the declaration that there is no adequate protection for life or property. It is not for Congress to decide whether New York fulfills her duty to her citizens of protection for their lives and property; and, therefore, the declaration of Congress on that subject, in respect to New York or Georgia, has no force whatever.

Advancing, then, to the question of fact, as one of which this court takes judicial notice, what do we see? We see a State government in Georgia, established under a written



Constitution, carried on by separate departments—legislative, executive, and judicial—and continued in an unbroken line from the Declaration of Independence until the passage of these military reconstruction acts; unbroken, I should have said, save in a single instance, when the military officers of the United States forbade the Legislature of the State to assemble, or her courts to hold their sessions. That break, being caused by the Federal forces, can not be set up as a reason for Federal interference. We have here the series of statutes regularly continued through every year, and reports of judicial decisions rendered from term to term, down to the present hour.

It is impossible to shut our eyes to the fact that, however censurable and criminal may have been the conduct of the Legislatures of the rebel States during the rebellion, there were, nevertheless, established governments during all the time, carrying on their operations with as much regularity as the loyal States carried on theirs. In some respects, I am sorry to say, they put us to shame. They protected their citizens against arrest and imprisonment better than did some of ours. Their reports abound with cases of discharge on *habeas corpus* of persons arrested and detained by military officers. I have before me an act passed by the rebel Congress just before its final overthrow, authorizing the suspension of the *habeas corpus*, and I wish the act of our own Congress, in suspending the privilege in the loyal States, had been as carefully guarded against abuse. "*Fas est et ab hoste doceri.*"

Whether there is "*adequate* protection for life and property" in the State of Georgia I do not know, as I do not know what is meant by *adequate* protection. If one will make a visit to Europe and read the issues of the daily press, he will find that, according to European ideas, there is not "*adequate* protection for life or property" in some of the most loyal States of this Union. What do we, in fact, say of ourselves: was there adequate protection for life or property in the anti-rent districts of New York for the ten years between 1840 and 1850? Is there now adequate protection for life or property in the mining districts of Pennsylvania? Is it meant by adequate protection that crime is punished with



celerity, certainty, firmness, and impartiality? If this be meant, let some of our States, whose public men are very boastful in this crisis, look out for their own reputation.

I have thus gone through these military statutes, and examined their provisions, together with the reasons on which they profess to be founded, and I submit that the reasons are not realities, and, if they were, that they would not justify the statutes.

But it is said that there are other reasons, not stated in the preamble, which justify them. Without stopping to inquire whether it be competent for the citizen to suggest reasons for an act of Congress, different from those which Congress itself has put forth, it is better to meet and answer, if we can, all which may be suggested.

Four reasons have been suggested: one, that Congress is the sole judge of what is a republican form of government, and when it adjudges the government of a State not to be republican, it may force a military government upon it; the second, that the rebel States were conquered, and, being so, may be governed by the same military force which conquered them, so long as Congress sees fit to continue such government; the third, that by the rebellion the government and people of the Southern States forfeited all their rights; and the fourth, that Congress may now govern the rebel States, in the exercise of belligerent rights. Each of these reasons will be considered by itself in the order in which I have stated them:

1. The United States is to guarantee to each State a republican form of government.

What is the true meaning of this provision? What is the guarantee of a republican form of government? Under color of this power, can the Federal authorities destroy the existing State authorities? Such is not the natural import of the words. To guarantee is not to create, but to warrant the continuance of that which is already created, or the performance of that which is already undertaken. This construction is the only one compatible with public safety. To give the Federal Government the unlimited power of destroying any State government upon the allegation that it is not republi-

can, is to give to the central authority a control over the local authorities greater than was ever dreamed of before, and is to make way for a consolidation fatal to the rights of the States and the liberties of the people.

The history and contemporaneous exposition of this clause of the Constitution will show that it has no such meaning as the defendants claim for it.

The subject was first brought before the convention which framed the Constitution by Mr. Randolph, who proposed it in this form: "*Resolved*, That a republican government, and the territory of each State, except in the instance of a voluntary junction of government and territory, ought to be guaranteed by the United States to each State." (2 Mad. Papers, 734.) Afterward, "Alterations having been made in the resolution, making it read, 'That a republican constitution, and its existing laws, ought to be guaranteed to each State by the United States,' the whole was agreed to, *nem. con.*" (2 Mad. Papers, 843.)

On a subsequent day, after considerable debate, Mr. Wilson moved, as a better expression of the idea, "That a republican form of government shall be guaranteed to each State; and that each State shall be protected against foreign and domestic violence." This seeming to be well received, Mr. Madison and Mr. Randolph withdrew their propositions, and on the question for agreeing to Mr. Wilson's motion, it passed, *nem. con.*" (2 Mad. Papers, 1139.) The language was afterward changed to the form which it now bears in the Constitution.

In the forty-third number of the "Federalist," written by Mr. Hamilton, is the following exposition:

"In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other, and the greater right to insist that the forms of government, under which the compact was entered into, should be *substantially* maintained.

"But a right implies a remedy; and where else could the remedy be deposited than where it is deposited by the Constitution? Governments of dissimilar principles and forms have been found less adapted to a fed-

eral coalition of any sort than those of a kindred nature. 'As the Confederate Republic of Germany,' says Montesquieu, 'consists of free cities and petty states, subject to different princes, experience shows us that it is more imperfect than that of Holland and Switzerland. Greece was undone,' he adds, 'as soon as the King of Macedon obtained a seat among the Amphictyons.' In the latter case, no doubt, the disproportionate force, as well as the monarchical form of the new confederate, had its share of influence on the events. It may possibly be asked what need there could be of such a precaution, and whether it may not become a pretext for alterations in the State governments without the concurrence of the States themselves. These questions admit of ready answers. If the interposition of the General Government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular States by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers? To the second question it may be answered that, if the General Government should interpose by virtue of this constitutional authority, it will be, of course, bound to pursue the authority. But the authority extends no further than to a *guarantee* of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the Federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the Federal guarantee for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican constitutions—a restriction which, it is presumed, will hardly be considered as a grievance."

The purpose of this guarantee of republican government was, therefore, to protect the States against "*aristocratic or monarchical innovations*." Who would have thought that in less than eighty years this clause would be invoked as authority for forcing upon the States the most radical *innovations* in the opposite direction?

It is not for me in this place to say whether I think these innovations good or bad, nor is my opinion of any importance. If it depended upon me, and so far as I could constitutionally act, I would make every human being equal before the law. But I would not break the Constitution of my country for any innovations whatsoever. Without a written Constitution, republican government is impossible; and any instrument pretending to be a constitution is only such so far as it is inviolable. Our choice lies between maintaining against



all opposers the inviolability of written constitutions, or subsiding into monarchical governments.

It is said that *Luther vs. Borden*, 7 How., 1, sanctions the claim of a right on the part of Congress to interfere in the internal government of a State greater than I have admitted; but that is a mistake. The acts complained of in that case were done under State authority, and the contest was between two rival governments, each claiming to be the lawful government of the State. The contesting government claimed that it had been adopted by the vote of the whole people, exercising for the first time the elective franchise; the government in possession had admitted to the exercise of the franchise only a part of the people, and rested upon that part for its authority; and the judges were asked to decide that the contesting government was the true one, on the ground that it had received the sanction of the whole people. The court, by Chief-Justice Taney, decided that the question, which of the two opposing governments was the legitimate one, viz., the charter government or the government established by the voluntary convention, had not heretofore been regarded as a judicial one in any of the State courts; that the courts of Rhode Island had decided in favor of the validity of the charter government, and the courts of the United States adopted and followed the decisions of the State courts in questions which concern merely the Constitution and laws of the State, and then went on to say:

“Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the General Government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

“The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and, on the application of the Legislature or of the Executive (when the Legislature can not be convened), against domestic violence.

“Under this article of the Constitution, it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State be-



fore it can determine whether it is republican or not. And when the Senators and Representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the Government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and, as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.

“So, too, as relates to the clause in the above-mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened, which required the Federal Government to interfere. But Congress thought otherwise, and no doubt wisely; and, by the act of February 28, 1795, provided that, ‘in case of an insurrection in any State, against the government thereof, it shall be lawful for the President of the United States, on application of the Legislature of such State, or of the Executive, when the Legislature can not be convened, to call forth such number of the militia of any other State or States as may be applied for, as he may judge sufficient to suppress such insurrection.’

“By this act the power of deciding whether the exigency had arisen upon which the Government of the United States is bound to interfere, is given to the President. He is to act upon the application of the Legislature, or of the Executive, and consequently he must determine what body of men constitute the Legislature, and who is the Governor, before he can act. The fact that both parties claim the right to the government can not alter the case, for both can not be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress.”

And again :

“No one, we believe, has ever doubted the proposition that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not by abolishing an old government and establishing a new one in its place, is a question to be settled by the political power.

And when that power has decided, the courts are bound to take notice of its decision, and to follow it."

2. The argument from conquest is this: We have conquered the rebel States, and we can impose on them the will of the conqueror. But is this a sound argument? How have we conquered the rebel States? We have overcome the rebel armies, and there is not a hostile hand raised against us in all our dominions, from sea to sea. Has this overthrow of the rebel armies operated to transfer the Government from the conquered to the conqueror? Or, to state the same idea in a different form, has it operated to transfer the sovereignty from one sovereign to another; from the conquered sovereign to the conquering sovereign? Putting the question in this form answers it. The conquered State was sovereign before, in a qualified sense; the conquering States were paramount sovereigns before, also in a qualified sense. The suppression, by the latter, of the rebel forces of the former, was entirely consistent with the relations which previously existed between the two sovereigns; neither the war nor the victory changed the double allegiance of the citizen, one to his State and the other to his nation.

The laws of conquest have no application to a civil war. When a rebellion is subdued, the sovereign is restored to the exercise of his ancient rights. If a county in New York is declared to be in a state of insurrection, force is applied to put the insurrection down; but when that is done, the law resumes its sway. The legal relations of the county to the State are not permanently changed, though their operations may have been suspended for the time being. By the laws of war between sovereign and independent states, when one has taken possession of the other, the will of the conqueror becomes the law, because he has no other relations to the conquered state than that of conqueror and master. If, however, there were antecedent relations, which the war has not broken, they are resumed the moment the war is over. The only inquiry in the present case is, whether the rebellion or the war has abolished or changed the legal relations of the State to the Union. Now, as we maintain that no act of the Federal Government can exclude a State from the Union, so no act

of the State can withdraw it from the Union. The war found it in the Union, subject to its laws; the war left it in the Union, subject to the same laws.

In barbarous times, the laws of war authorized the reduction to slavery of a conquered people. These laws have been softened under the influences of Christianity and civilization, till now it is the settled public law of the Christian and civilized world that the conquest of one nation by another makes no change in the property or the personal rights and relations of the conquered people. "The people change their allegiance," says Chief-Justice Marshall (7 Pet., 87, U. S. *vs.* Churchman), "their relation to their ancient sovereign is dissolved, but their relation to each other and their rights of property remain undisturbed." One change only is effected, and that is that one sovereign takes the place of the other. In a civil war, sovereigns are not changed unless the rebellion is successful.

It is very true that the rebel States themselves renounced their allegiance to their nation, or rather they denied that they owed any such allegiance, and maintained that their relation to the Union was that merely of parties to a compact. We, however, denied their theory, and insisted that they owed allegiance which they could not renounce; and for the support of these opposite theories each side took up arms. Now that we have won, it is not for us to deny the cause for which we fought. We are struggling to maintain the supremacy of the Constitution in the South, not so much for their sakes as for our own.

A little reflection will satisfy us that the opposite doctrine may lead to the most alarming consequences. Suppose that in Shays's rebellion the insurgents had got the better of the State government, and the troops of the United States had been brought in, and had suppressed the rebellion, would Congress, in that event, have been justified by the Constitution in imposing its own government upon Massachusetts? If the Federal Legislature may impose a government with one view, it may with another. It may impose one with a design to restrict the suffrage, as well as to extend it. Suppose, hereafter, a negro insurrection to occur in a Southern



State, or even a peaceable change to be made in its Constitution for the purpose of excluding a majority of the whites from the government, and domestic violence and revolt thence to ensue, which result in Federal intervention and suppression, would Congress in that event be justified by the Constitution in assuming the government of the State, and restricting the suffrage to the whites? Let us put this question. Suppose Georgia, in a war between the United States and Great Britain, had been conquered by the latter, and then retaken by the United States, would this Government hold the State as conqueror or as Federal sovereign under the Constitution? Most clearly the latter. The doctrine of *postliminy* rests on that foundation.

Let us look abroad and see what crimes have been committed under the plea of conquest. Ireland is a memorable example. "To the charge of arbitrary government in Ireland," says Goldwin Smith, "Strafford pleaded that the Irish were a conquered nation. They were a conquered nation, cries Pym. There can not be a word more pregnant and fruitful in treason than that word is. There are few nations in the world that have not been conquered, and no doubt but the conqueror may give what law he pleases to those that are conquered; but if the succeeding acts and agreements do not limit and restrain that right, what people can be secure? England hath been conquered, and Wales hath been conquered, and by this reason will be in little better case than Ireland. *If the king, by the right of a conqueror, gives laws to his people, shall not the people, by the same reason, be restored to the right of the conquered, to recover their liberty if they can?*"

Hungary is another example. The house of Hapsburg was deposed by the estates of the kingdom. A bloody war followed, and the estates were conquered. Then ensued a strife between the emperor and his subjects whether he was King of Hungary by the conquest or king by the Constitution, and, after many years, and the terrible warning of Sadowa, he was compelled to yield, and the Hungarians are now resting in the shelter of their ancient Constitution.

3. A third reason given for the military government of the South is that the rebel States and their people forfeited



their rights by the rebellion. To this argument it might be answered that our present concern is not more about the rights of the South than about our own rights. It is not what they deserve, but what we have a right to do. We are restrained by the law, which we have fought to maintain, and which we now assert, not for their sake, but for ours. Not confining ourselves to this answer, however, we insist that there is a fallacy in the assertion that the rebel States and people have forfeited their rights by the rebellion. First, let us understand what act is claimed to have caused the forfeiture, the rebellion, or the war to maintain it. It can hardly be the act of throwing off their allegiance, that is, of renouncing the authority of the United States, which is supposed to cause the severance of the legal ties between the Union and the States, for the obvious reason that one party to a compact can not dissolve it by his own act without the consent of the other. Is it, then, the war which is supposed to have produced results so extraordinary? That can only happen because the levying of war is treason. In fact, the proposition is stated in its strongest form when it is stated that the war of the rebels was treason, and that traitors have no rights. But it is not true that traitors have no rights; they have all their rights until they are convicted of treason, or, perhaps, the better form of stating the proposition is that they are not to be accounted traitors until they are convicted of treason. The Constitution has carefully defined treason to consist in levying war against the United States or adhering to their enemies, giving them aid and comfort, and has declared that no person shall be convicted of the crime unless on the testimony of two witnesses to the same overt act, or upon confession in open court. So there can be neither treason nor penalty of treason until after conviction; and Congress has not competency to convict, however great and manifest may be the crime.

There is another answer to the argument of forfeiture, and that is that treason is a *personal* crime. There can be no treason of a State, though there may be of all the persons who compose it. Whatever may have been the misconduct of the citizens of Georgia, even though every one of them

were guilty, the State, the corporate body, did not, because it could not, commit the crime of treason.

4. As to the doctrine of belligerent rights, what countenance does that give to the present government of the South by the army? There are no longer belligerent rights, because there are no more belligerents. The moment the war ceased, the laws of war ceased also.

This should seem to be a sufficient reason, but, as the argument is much insisted on, I will follow it further. The question of belligerency and belligerent rights received great attention in the prize cases, where the court laid down certain fundamental propositions. One of them, relating to the fact of a civil war existing, was this: "The true test of its existence, as found in the writings of the sages of the common law, may be thus summarily stated: 'When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice can not be kept open, *civil war exists*, and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land.'"

 (2 Black, 667.)

Applying this rule to the present case, it follows that civil war can no longer be recognized as existing in Georgia, because the courts are open. Therefore, whether during the war the just exercise of belligerent rights would have authorized the Federal Government to take into its hands the entire government of that State, there is no warrant for any such exercise now.

Another proposition in that case was that the courts will take judicial notice of the beginning and progress of the civil war. Of course, for the same reason, they will take judicial notice of its end.

The Court says: "By the Constitution, Congress alone has the power to declare a national or foreign war. It can not declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole executive power. He is bound to take care that the laws be faithfully executed. He is commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called

into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State."

A further proposition of that case was that, by exercising belligerent rights, the United States did not lose those which were sovereign. If their sovereign rights remained, their duties, as sovereign, remained also. The exercise of belligerent rights was, in fact, for the purpose of regaining the complete enjoyment of their sovereign rights, and for no other purpose.

The language of the Court was: "The parties belligerent in a public war are independent nations. But it is not necessary to constitute war that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights as against the other."

It is further to be observed that belligerent rights are to be exercised by the Executive, and not by Congress. In the present instance the Executive exercises, and attempts to exercise, none against the State of Georgia, or any of her people. Indeed, he disclaims any such authority; these military acts were passed over his veto; and, if the argument from belligerency should prevail, we should have the extraordinary spectacle of the Legislature exercising an executive function without the consent and against the protest of the Executive.

It is, furthermore, to be observed that, while the war lasted, their belligerent rights did not authorize the United States to carry on the entire government of Georgia. What, indeed, might they do while the war was raging? They might govern their own armies and subdue the armies of the rebels. As soon as that was done, or as fast as they advanced, they could proceed to reorganize their own displaced government in its former estate, open the Federal courts, run the Federal mails, collect the Federal revenue; in short, do all that they could do before. But might they not do something more? That depends upon their rights and their duties under the Constitution. This Government is a limited one, and its rights and duties are defined and limited by the Constitution, and, if you can not find there the warrant for its action, it can



not act at all. If a State of this Union should fall into great disorders, so that her finances should become ruinous, her treasury bankrupt, her roads infested by robbers, property and person insecure, with an impotent Executive, a babbling Legislature, and a venal judiciary, could Congress step in and take the government of that State into its own hands? I can perceive no authority for their doing so; and, if authority is necessary, it must be sought by an amendment of the Constitution. It is as clear as noonday that the theory of our present Constitution is that the States shall organize themselves, and that Congress has nothing to do with it; except that if in such organization the States should introduce aristocratic or monarchical innovations, it might then interfere to insist upon their going back to their republican forms.

But it may be asked, Can not the Federal army, which goes into a State to suppress a rebellion, govern the country as it advances into it? I answer, as a similar question was answered in Milligan's case, "*necessitas, quod cogit, defendit.*" The advancing and occupying army must govern itself by the laws of war; it must keep the peace within its own lines, and for that purpose it must govern the people within them so far, and so far only, as ordinary civil government is impossible. For example: When the city of New Orleans was taken by the Federal forces, all the Federal laws applicable to the port and district went again into operation; but, if there were no State officers competent to administer or execute the State laws, the commanding officer of the occupying forces must, of necessity, for the safety of his own army, as well as of the society within his lines, preserve order, and might make regulations for that purpose. This, I suppose, is the rule, and the whole of it.

Even this power ceases with the necessity of its exercise. The moment the military occupation (*occupatio bellica*) ceases, that moment the right to govern, even within the narrow limits which I have explained, ceases also. Is there no period, then, after the cessation of hostilities during which the military occupation may continue? No intermediate state between the state of war and the state of peace? No interval after hostilities, and before the re-establishment of civil gov-



ernment? To this question, as applicable to this case, I answer :

I. The occupying forces must have reasonable time to retire with their war material ; and, so long as they necessarily remain for that purpose, so long the reason of the rule applies, and therefore the rule itself ; but they have no right to remain longer.

II. The *Federal* civil government is, of course, capable of being put into full vigor as soon as the rebellion is suppressed. To guard the Federal property, to protect the Federal officers, to assist in the execution of Federal process, the troops may always remain, in peace as in war.

III. If no State authorities whatever are left, and the people are absolutely without magistrates or officers of any kind, so that the withdrawal of the Federal troops would be the signal of a general massacre or pillage ; then the troops may remain, just as any other body of men may remain, in the interest of humanity, and upon principles of common or universal law, to prevent the commission of crime or violent injury to person or property. If the captain of an American frigate in a Chinese port finds a condition of anarchy and general pillage on shore, I suppose he may land the ship's company to stop the violence and rapine, but that does not imply any right in the captain to govern the town.

IV. If there be an existing State government *de facto* or *de jure*, the question can not arise. There was such a government in Georgia when the war closed. The retirement of the Federal troops would have left the State impoverished and exhausted, no doubt, but not without a government.

If this court is not bound by the declaration of Congress, that there are no legal State governments in the South, no more is it bound by the declaration of the President, that there were none when the war closed. Indeed, if I might venture the suggestion, which I do with great diffidence, the true course at the close of the war was to consider the governments then in existence as governments *de facto*, which could become governments *de jure* on taking the oath of fidelity to the Federal Constitution. Congress would not have felt itself obliged to admit any but loyal representatives

to seats. The suggestion is not at all important to my argument, but candor obliges me to say that I think the source of all the difficulty that has since been encountered was in the departure from the true theory of our Government when the rebel army surrendered. Indeed, I can not help thinking that the general form of capitulation arranged by General Sherman, without reference to its details, was constitutional and statesmanlike.

Having thus shown that the occupation of a State by a conquering army did not effect any such change in the rights and duties of the people, as is supposed in the defendants' argument, even if the two contending parties were regarded as independent States, and the war what is called by jurists a public war, I might add as an additional and conclusive argument of itself that in a civil war there can be, strictly speaking, no such occupation—*occupatio bellica*. "In a civil war," says Phillimore, "there could be no *occupatio*." (3 Phill. Int. Law, 704.) "A civil war," says Grotius, "is not of the same kind, concerning which this law of nations was instituted." (Grotius L. 3, C. 8, § iv.)

Halleck, in his work on "International Law," p. 806, § 29, says:

"In the civil war between Cæsar and Pompey, the former remitted to the city of Dyrrachium the payment of a debt which it owed to Caius Flavius, the friend of Decius Brutus. The jurists, who have commented on this transaction, agree that the debt was not legally discharged; first, because in a civil war there could be, properly speaking, no *occupation*; and, second, because it was a private and not a public debt."

In a late case in North Carolina, where it was attempted to apply the principles of the "*occupatio bellica*" to the sequestration, by acts of the insurgent State, of a debt due to a citizen of a loyal State, the court rejected the defense, and said: "These acts did not effect, *even for a moment*, the separation of North Carolina from the Union, any more than the action of an individual who commits grave offenses against the State by resisting its officers and defying its authority can separate him from the State. Such acts may subject the offender even to outlawry, but can discharge him from no duty, nor relieve him from any responsibility."

After this opinion of the chief-justice of North Carolina, let me read from the opinion of Mr. Justice Sprague, in the case of the *Amy Warwick* (24 Law Rep., 498):

“An objection to the prize decisions of the district courts has arisen from an apprehension of radical consequences. It has been supposed that if the Government have the rights of a belligerent, then, after the rebellion is suppressed, it will have the rights of conquest; that a State and its inhabitants may be permanently divested of all political privileges, and treated as foreign territory acquired by arms. This is an error, a grave and dangerous error. The rights of war exist only while the war continues. Thus, if peace be concluded, a capture made immediately afterward on the ocean, even where the peace could not have been known, is unauthorized; and property so taken is not prize of war, and must be restored. (Wheaton, ‘Elements of International Law,’ 619.) Belligerent rights can not be exercised when there are no belligerents. Titles to property or to political jurisdiction, acquired during the war by the exercise of belligerent rights, may indeed survive the war. The holder of such title may permanently exercise during peace all the rights which appertain to his title; but they must be rights only of proprietorship or sovereignty; they can not be belligerent. Conquest of a foreign country gives absolute and unlimited sovereign rights. But no nation ever makes such a conquest of its own territory. If a hostile power, either from without or within a nation, takes possession and holds absolute dominion over any portion of its territory, and the nation by force of arms expels or overthrows the enemy and suppresses hostilities, it acquires no new title, but merely regains the possession of which it had been temporarily deprived. The nation acquires no new sovereignty, but merely maintains its previous rights. (Wheaton, 616.) During the War of 1812 the British took possession of Castine, and held exclusive and unlimited control over it as conquered territory. So complete was the alienation that the Supreme Court held that goods imported into it were not brought into the United States so as to be subjected to import duties. (*U. S. vs. Rice*, 4 Wheaton, 246.) Castine was restored to us under the treaty of peace; but it was never supposed that the United States acquired a new title by the treaty, and could thenceforth govern it as merely ceded territory. And if, before the end of the war, the United States had, by force of arms, driven the British from Castine, and regained our rightful possession, no one would have imagined that we could thenceforth hold and govern it as conquered territory, depriving the inhabitants of all pre-existing political rights. And when, in this civil war, the United States shall have succeeded in putting down this rebellion and restoring peace in any State, it will only have vindicated its original authority, and restored itself to a condition to exercise its previous sovereign rights under the Constitution. In a civil war the military power is called in only to maintain the Government in the exercise of its legitimate civil authority.



No success can extend the power of any department beyond the limits prescribed by the organic law. That would be not to maintain the Constitution, but to subvert it. Any act of Congress which would annul the rights of any State under the Constitution, and permanently subject the inhabitants to arbitrary power, would be as utterly unconstitutional and void as the secession ordinances with which this atrocious rebellion commenced. The fact that the inhabitants of a State have passed such ordinances can make no difference. They are legal nullities; and, it is because they are so, that war is waged to maintain the Government. The war is justified only on the ground of their total invalidity. It is hardly necessary to remark that I do not mean that the restoration of peace will preclude the Government from enforcing any municipal law, or from punishing any offense against previous standing laws."

Shall we be told that this is a *political* question, which is beyond the competency of the courts to determine? A fortnight ago this would have come with more weight than it comes now. Then, judging by what we saw in Congress and read in the newspapers, one would have supposed that the courts were not to be permitted to judge of what had been determined in Congress; or that whatever that body chose to call political could not be reviewed here. But we now see all parties looking to this court for the arbitrament of the controversy which has reached its height between the legislative and executive departments of the Government. The experience of a few days has taught many, what was understood by thoughtful observers before, that this court is the great peace-maker, and nothing but its peaceful interposition can prevent collisions of force.

What is a political question? Is it one which affects the policy of parties, or is decided by partisan views? This is the very question that is most likely to lead the legislative department into excesses which it needs the judicial to correct. If Congress were to pass an act of attainder, with a purely political motive, or for a purely political end, does any one suppose that this court is not competent to pronounce it unconstitutional and void? A political question, I apprehend, is one which the political department of the Government has exclusive authority to decide. Such a question is not so much one beyond the competency of courts, as it is one in deciding which the courts will follow the other departments.

And, lastly, shall we be told that Georgia is not a State



of the Union, competent to sue in this court? If she is a State at all, she is competent to sue. She was a State once—of that there can be no doubt. Long before the Revolution she was a province by herself. She was one of the united colonies which declared their independence on the 4th of July, 1776. Her deputies sat side by side with the deputies from other States in the Congress of the Confederation. She joined in the convention to frame the present Constitution. Her votes are found in the divisions on all the articles. She was among the first that ratified the Constitution. She was a State of this Union when Washington sat in the presidential chair. Having been once a State, when did she cease to be such? Did she go out of the Union when she madly, blindly adopted an ordinance of secession? We denied that at the time, and we must deny it now. Did she go out when her troops, under Lee, were confronting ours? We denied that all through the war, and we must not admit it when the war is over. Her shield has hung ever in the Senate-chamber; her motto might be read any day on the ceiling above the representatives. There shine her name and her device. No dark day of blood has hidden them; no rude hand has wiped them out. May her representatives soon be there, never again to turn away! Georgia was a State of this Union when the Union began, she is a State now, and I hope she will be a State as long as the Union lasts; and may that be perpetual!

Thus have I gone over, and endeavored to meet the arguments, one by one, of those who contend for the constitutional validity of these military statutes. It is matter for congratulation that they have no support in the organic law. It would have been a reproach to our great forefathers if they had created an instrument of government so imperfect in its guarantees of the rights of the States and the people that a majority of Congress can rule one third of the nation by the army alone. The more one studies the Constitution, the more he admires its magnificent and just proportions. It was made for peace and for war; for the guidance of the good and the restraint of the wicked; for support of the weak and defense against the strong. Let us cherish it, defend it, and honor it forever!

## SPEECH AT THE WILLIAMS ALUMNI DINNER.

FEBRUARY 22, 1870.

THE alumni of Williams College living in the neighborhood of New York held their annual dinner at the St. James Hotel. Mr. Field presided. Among the distinguished guests were Rev. Dr. Hallock, of the class of 1819; Mark Hopkins, President of the College; Samuel McClellan, Mayor of Wheeling, Virginia; William C. Bryant; E. H. Allen, Chief-Justice of the Hawaiian Islands; Judge Benedict; President Brown, of Hamilton College; and S. Irenæus Prime.

The cloth having been removed, Mr. Field announced the first toast, "The President of the United States," which was drunk standing.

In announcing the next toast, "Our Alma Mater," Mr. Field said:

In a corner of Massachusetts, pushed out farthest toward the northwest, lies an irregular and wide-branching valley, resting in the lap of the mountains. Greylock, the highest peak in the State, where the frost comes earliest in autumn and stays latest in spring, rises from this valley into the region of clouds. The Hoosac sparkles, as its two branches come dancing from opposite sides of the great mountain, to meet at the famous "Junction" and wind slowly away. You may stand anywhere, and look east and south upon the fair lands of Massachusetts, north upon the green hills of Vermont, and west upon the mountain-barriers of New York. Every meadow of this valley, every swell of the hills, every brook and glen, every tall tree, are familiar to our memories, as they were familiar to our eyes in the dear old college-days. We know every wave of the horizon-line, as it rises to the mountain-tops and sinks to the passes where the streams enter or go out.

Here stand the college halls, around which cluster so many memories. We remember every nook and corner of them. The well-trod stairs, the homely doors, out of which came six times a day so many hurrying feet; the low windows, from which looked, in the summer twilight, so many familiar faces; the trees sheltering the walk, and waving welcome through summer and winter; the belfry with its irrepressible tongue, ringing the students to and fro; the well-thumbed books; the grave and learned professors, the chapel and the recitation-room—all these reappear as we, this evening, turn from the present back to those early years. How cheerful all things future then appeared! There were no disappointments in store for us, no breakdowns in life, no mortifying defeats, no crushing sorrows. The coming days seemed as bright as the sunrise which lighted the eastern hills.

Our pride as well as our affection binds us to this seat of learning. The story of its origin is as poetical as anything in old romance. And what a contrast does it form with its subsequent history! Though it sprung from a military enterprise, it gave rise to the most flourishing missionary enterprises of modern days. Think of the old colonial regiments, under the banner of St. George, defiling through the mountain-passes to meet the French and Indians on the lakes; and then think of the little band, with their prayers and hymns, under the "haystack," and the companies of American missionaries in long succession going forth to plant the banner of the Cross on African, Asiatic, and Polynesian shores! Let it not be supposed, however, that our college is in other respects behind her sister colleges. In all the professions she has her full quota of representatives; and in Congress, according to a statement lately published, she has as many of her sons as any other college, excepting only Yale.

To this our college and its memories we devote the present evening. Let us greet each other after the old fashion. Let us look again in the faces, and hear the voices of college friends. Which of us does not love to recall the happy days when he walked with his classmate along the Hoosac or climbed the Greylock, or sat by the college-window looking at the sunset clouds, or strove at the recitation, or debated in

the Logian or Technian? Whose heart does not swell at the recollection of the meetings and partings we had in those years; the separation at vacation, the coming together again at the beginning of term, fresh and eager; the final parting and dispersion from that little world of study and seclusion into that great outer world of which we knew so little, and which we have found so cold and hard? Let us for this evening go back to those days, and begin with the accustomed salutation—" *Alma Mater Gulielmense!* "



## MEETING OF THE WOMAN'S PEACE CONVENTION.

Speech of Mr. Field in New York, 1870.

LADIES AND GENTLEMEN: This, I suppose, may be regarded as a small meeting, but I hope that no one will be discouraged by that. For my part I am quite used to being in a minority, and may almost say that I take some pride in it. I remember when I first came to this city, a very young man, being concerned for a poor fugitive female slave whom I did all I could to rescue from being sent back to slavery. And I remember at that time I was almost mocked for my efforts. And from that day to this I have not ceased to feel a great respect for a minority. I believe the world is moved by a few persons who begin in a minority and who labor on until, at last, they make a majority. The object of this meeting has been so well explained by the lady who presides over it that scarcely anything need be said in respect to that. We know very well what it is not, and we know what it is. It is not a meeting to promote woman suffrage—that we understand. There are persons here, I have no doubt, who are in favor of woman suffrage, and there are persons who are against it. This meeting takes no part in that question. It is not a meeting, moreover, to put women into different occupations from those which they now occupy. We have different opinions about that, perhaps. I have my own very decidedly; others may differ from it. This meeting, at all events, is not for that purpose. Nor yet is it a meeting to promote any change in woman's education, however desirable that may be, and however great may be the unanimity among us or in the community in respect of that. But it is a meeting to promote peace by the influence of woman. That is its object, and its sole object. Let us look, then, at the end and at the means. The end is peace, not war—peace among the nations of the

earth. Is it possible? Let us see. That peace can be secured at all events, and at all times, and under all circumstances, I am not one to maintain; because in the present age of the world we may not have arrived at the stage when such things can be done. I will show you in a few minutes how I think we are gradually tending to that end, though we may not yet have arrived at it. War at some time and under some circumstances is a necessity. In the later years of the world I do not believe that Italian unity would have been procured, nor do I think even that German unity could have been procured, without it. I think there is a right of an oppressed people—of people who have been subjected by force to resist by force. But that is no answer to our argument, nor any objection to the course which our friends are taking here to-night. Peace is the ultimate end. Peace may finally be obtained. I think we have arrived at a stage when we can introduce a substitute for war; and let me show why and how I think we have arrived at that. In the earlier ages of the world each man redressed his own injuries. War between man and man was then the law of the state. And even so late as the Jewish economy we know that the law of retaliation prevailed, and that cities of refuge were used in order to prevent the manslayer from avenging the blood of his relations. But society, in its progress, put an end to war between man and man, because it provided a tribunal which should decide all questions, and should avenge the blood of any one who was slain. Next in the progress of civilization came the war between family and family, such as existed in the last generation, or in the last age in Scotland between clan and clan—for clan is nothing but a family. Next came—for that was put down in the same way—a higher power, created to keep peace between the clans and to forbid private war, or war between them. Next came the tribes. And then there was war between them to right themselves and to avenge their wrongs, and that was ended in the same way. We do not allow war between the Indian tribes in our own country, though their habits and their principles would lead them into it. Next after that came the wars between princes, such as we have seen in Germany, such as lasted there up to the last age; independent princes, each

seeking to avenge his own wrongs or to obtain his rights by means of war upon another prince. That mode of redress was in due time put an end to by a superior power, by the unity of the princes, and by the establishment of a common authority over them, and so that was ended. Next came the nations, but the nations are still warring against each other. Now, the lesson that we are to learn is this, the lesson which history teaches—that what we are to seek is a common authority to decide disputes between nations. That being accomplished, we produce the peace; that is to say, we make it just as impossible or just as difficult to have a war between two nations as it is now to have a war between two principalities in Germany, between two tribes on our North American plains, or between two clans in Scotland. Is that possible? We may not be able absolutely to prevent war, but can we by any means create a council, a board of arbitration, a supreme court, to settle the disputes between nations? If we can, we can generally produce peace between the nations of the world precisely as we produce peace between the States of the American Union. Above all other lessons, I think America has taught that great cities or communities can be coerced by a power above them. Here is the city of New York, a commonwealth stronger than Holland in her palmyest days. When Holland was the mistress of the sea, and burned the English fleet in the Thames, she had not the power and wealth of this imperial city of New York, in which we live so peacefully and in which we are so protected by the common authority of the State and the Union. Holland and Portugal are each smaller than the State of Pennsylvania. There are four or five of our States larger than Denmark. Now, if New York, Pennsylvania, Ohio, and Illinois can be subjected, as they are, to the control of the nine gentlemen who sit day after day in their robes at Washington, why, in the name of common sense, can not Portugal, Holland, Denmark, and Greece be subjected in the same way? There can be no reason, unless you suppose that the American is much more docile and easier to govern than the Portuguese, or the Dutchman, or the Dane. I think the scheme of peace—peace between the nations—through the means of a court of arbitra-



tion, is not the dream of enthusiasts, but something possible to be realized, and therefore that the end which this meeting proposes to attain, or to help to attain, is a reasonable one, and one which ought to meet with universal favor. The next question is how to attain it—and to enlist the influence of woman, as proposed by this society. Why should we not have the influence of woman? If man only suffered the calamities of war, it might be said that woman had nothing to do with it; but since, unluckily, it is not the man alone nor man the most, but women and children that suffer most, surely it is the right, it is the duty of woman to do what she can in her own sphere, by her own proper efforts, to prevent war. One may prefer something besides a congress. I should prefer that you would give it a less significant and pretentious name. If you will have a meeting of women, you may call it a conference of women or a meeting of women. For my part, I think you should bring women together by correspondence; have societies all over the civilized world, acting in communication with one another, and by that means create opinion. Your resolves will do nothing. If half the women in England and half the women in America were to get together and pass a resolution, it would be nothing more than the opinion of so many women on this particular subject; and if you can get that opinion in any other way it is just as good. But, perhaps, I ought not to enlarge upon this, for, after all, you are better judges than I. I only give you my view of the matter. But what I do urge, what I maintain, is not only that woman has the right to an opinion, a right to exert her influence on the question; but that she has the right, and is bound just in proportion to the importance of the subject; is bound to secure the co-operation of all her sisters under the sun. Now, I suppose, madam, that this is, after all, the question of this meeting. The end no woman with a womanly heart can say is not a good one. The means, the influence of women is legitimate, the very best. In short, wherever on the globe there is a man, let there be beside him a woman to cheer him when he is obliged to fight, but, better than all, to find a just reason to stay the fighting.



# BANQUET TO THE CHINESE EMBASSY.

JUNE 23, 1868.

Ninth regular Toast : " International law preserving peace in both hemispheres."  
Response by Mr. Field.

INTERNATIONAL law is rather a grave subject for an after-dinner speech. But I suppose the committee of arrangements thought that the new international relations, which this banquet celebrates, required some recognition of the value of the rules which define and govern these relations and of the extension and melioration which they are likely to receive from the entrance of this new member into the family of nations. Certain it is that there never has been presented a better opportunity for a reform of the international code than that which this Oriental mission now presents.

International law is the fruit of international intercourse. It is the slow growth of ages, first springing forth on the shores of the Mediterranean, then cultivated anew on the Baltic, and thence extended into the open ocean, till it encircles the globe. The more nation meets nation, the more varied are their relations, and the more expanded become the rules respecting them. International law has grown into a system, so vast in its proportions, and so diversified in its details, that it affects, to a great degree, the prosperity and happiness of the human race. Unconscious of it as we may be, it nevertheless guides and supports us in ways innumerable. It marches at the head of armies, it commands in every fleet, it guards the deck of the merchantman, it protects the trader, and the traveler in foreign lands. Each new member of the brotherhood of states brings a contribution to its precepts. Its tendency is ever toward melioration. That great empire which we now welcome into the community of nations will help us, we trust, to still further meliorations.

Our policy is peace. The beneficent aim of the law of

nations is peace. And, although the day may be distant when wars will cease, we believe that it is possible to introduce such reformation of international law, as greatly to lessen the occasions of war, and to mitigate its evils when it occurs. If the negotiators of any two states of Christendom were to set themselves industriously to work to remove every cause of difference, and interpose the greatest obstacles to the occurrence of hostilities, can there be a doubt that war between them would be improbable, not to say impossible?

But, however it may be between us and the nations of Europe, let us make war impossible, or all but impossible, between us and the nations of Asia. Here we stand, between the East and the West, stretching out our hands over either ocean. And while we turn a face sometimes of defiance and anger toward the former, let us begin our international relations with the latter in the spirit of amity never to be broken. May the Pacific Sea ever be peaceful, in another sense than that in which it was named! May the treaty about to be made between America and China, form a new and better chapter of the law of nations; the opening chapter of a new book, more beneficent than any book of treaties that has ever yet been written! I envy the negotiators of that treaty, both of them Americans, representing, one the youngest, and the other, the oldest of the nations. The wise and the good of all lands will say to them: Write that which will stand for all time, as the model of a just and equal compact between sovereign nations, neither of which desires an advantage over the other, but both of them seek the freest intercourse of persons, the most liberal exchange of products, constant reciprocation of good offices, and perpetual peace: thus will they help to build up that international code of the future, in describing which, I will venture to use the language, slightly altered, of Sir William Jones:

“And sovereign Law, the world’s collected will,  
O’er thrones and globe elate,  
Sits empress, crowning good, repressing ill.”

## INDUSTRIAL CO-OPERATION.

An article published in "The North American Review," May, 1885.

ALTHOUGH the words corporation and co-operation do not spring from the same root, the things are closely related, for the object of corporations is in general co-operation. Most of our modern enterprises would be impossible without them. The State is a body politic and corporate, the city is another, the county and the township others still. These are public corporations; the private ones are sometimes for religious rites or for charity, more commonly for profit. Every church-spire is the sign of a corporate body. The chimes that ring out from the towers, the music that swells from the organ and rolls through the arches, are the voices of corporate service. The asylums that crown so many of our hills, proffering relief to the suffering, are endowed with the corporate faculty. The agencies that most affect modern society are the fruits of corporate action. The leviathans, no longer of oak, but of iron, that swim the seas, the railways that span the land, the telegraphs that flash intelligence from city to city across the next valley or beyond the seas, the machinery that plows and reaps the fields, and the mills that grind the harvests, are for the most part the outcome of corporate forces. As often as men need great wealth for great undertakings, they gather it together in a corporate name, and manage it with corporate faculties. The sands of Egypt have been pierced by a great canal, and the ridges of the Cordilleras are to be pierced by another, all by the agencies of corporations whose shareholders are scattered over the world. They who declaim against corporations as such know not what they do.

The spirit of association is one of the principal forces of our time. Within two generations it has brought the East into closer communion with the West, introduced China and

Japan within the international circle, and is now opening up the African Continent, through its great central river. The "Association Internationale du Congo," latest of international corporations, has brought the representatives of the great nations of Europe and America together in the German capital, to decide the fate of half a continent. This is the national or international development of the spirit of association. In private affairs the same spirit is, if possible, still more manifest. Men are more and more united in sympathy and enterprise, and feel more and more the need of all the aids possible to united action.

It is easy to see whence came the first outcry against corporations; it came from the abuse of corporate power. It was the fear of abuse that so long limited the granting of the privilege to few persons and few occasions. There was a time when special charters only were given, and they grudgingly, as much as to say, You ask for a favor, you seek advantage over your fellows, and while we yield to your importunity you must never forget how much you are beholden to our bounty. By-and-by the demands of business and the dread of corruption in the granting of favors led to the enactment of general statutes, under which all who choose may become incorporate. So it has come to pass that there are now in the State thousands upon thousands of corporations. But there is murmuring against them. Why? Because in our thirst for the wealth that these institutions help to increase we have neglected to fence them about with all the restraints that prudence should have foreseen to be necessary. We have, in fact, created a new class of beings, incorporeal, and mortal or immortal according to the will or caprice of their creator as chance or reason may have it, great in riches and in power, and formidable by the number of their dependants. No wonder that individuals often find themselves powerless before these aggregations of wealth and people; no wonder that the managers or governors of these institutions should sometimes forget their better nature in the consciousness of their power; no wonder that conflicts should arise frequently between the corporations and the individuals, and sometimes between the corporations and the State. That there is dan-



ger in the situation, none can deny. The problem is, how to avoid the danger while holding on to the benefit.

Many of the abuses of corporate powers have crept into our system from careless and hap-hazard legislation. Let us, for example, take a look into the statute-book of New York for the past ten years; a decade, be it remembered, when general statutes had come to be the rule and special charters the exception. At the last session seventy-four statutes were passed relating to corporations, some general, some special, new laws or amendments of old ones. If this be considered the average, the number of statutes relating to corporations passed in the last ten years reaches to seven hundred and forty. The cost of a session of the Legislature during these ten years, taking one year with another, has been about \$450,000, and as the number of statutes averages five hundred and fifty a year, the cost of one statute, if we were to measure the benefits of a Legislature by the statutes it enacts, would be a little more than \$800, and the cost of the laws relating to corporations passed last year would be about \$60,000, and of those in ten years the enormous sum of \$600,000.

For so great an outlay there should be something great in return. But what have we? Contradictions, confusion, uncertainty. The principal corporations formed for profit are banks, insurance companies, trust companies, railway, telegraph, and manufacturing companies. There is not the slightest reason why all these corporations should not hereafter be formed by the like number of persons and under one general law. As it is, they are formed under different laws, diverse in principle and diverse in details. A bank may be formed by one person or by many; an ordinary insurance company, be it marine, life, or fire, by any number not less than thirteen; but a town insurance company must have at least twenty-five; a railway corporation for a railway in this State, must have not less than twenty-five to bring it into being, while one formed here for another country need have but ten. A telegraph company may be established by any number of persons; a manufacturing company must have at least three.

Corporations are complained of as monopolies. So far as the franchise of being a corporation is a privilege, it may be

a monopoly or not, according as the privilege is exclusive or open to all. In New York it is open to all, for certain kinds of business, though burdened in particular cases with unwise technicalities and unnecessary risks. In respect of other privileges, the possessor may or may not have a monopoly, according to their nature and extent. A railway company has a monopoly if it has an exclusive right to run between definite places, otherwise it has not a monopoly.

The real cause of complaint is, that the enormous aggregations of capital invested in corporations fall into few hands, and, without adequate restraint, control great interests and great numbers of persons. We forget, however, that the same amount of capital in a single hand might be used more effectively and more oppressively than in the hands of several managers of a corporation. For this reason the restraint of corporate capital is easier than the restraint of individual capital. The regulation and control of corporate action is really one of the easiest of the functions of modern government. The great guilds of former ages were more powerful and unmanageable than any corporation we are concerned with.

For our times and our wants, wise and comprehensive legislation is needed. What it should be, this is not the place to discuss. The subject is too large for a single paper. But one thing is certain: the State should keep and exercise control over every corporate franchise. A franchise is a privilege that the possessor enjoys beyond the rest of the citizens. For that reason it should never be irrevocable. Equality of rights is the foundation of republican government, and whenever, for any reason, some out of the body of citizens are invested with peculiar privileges, these should be revocable at all times, saving such guarantees as the inviolability of property requires. In other words, it should be a cardinal maxim that there can be no private property in privilege. It is enough here to say that I think it possible to protect the rights of the State, and at the same time the rights of the citizen who has received the grant of a franchise and under it has invested his property. There must be some feasible plan of reconciling the rights of the State with rights of corporate

proprietors, which, while it guarantees the former, will protect the latter as well. Meanwhile let us turn to another view of the corporate function.

May we not prudently and wisely carry the principle of association a little further, and make it help bridge over the chasm, yawning wider and wider every day, between capital and labor? The hostility to corporations has grown, as already mentioned, out of hostility to associated capital. Why not, then, enlarge these agencies so as to make them associations, not of capital only, nor of labor only, but of capital and labor united? Can this be done? If we are not able to solve the problem altogether, we may perhaps help solve it in part; at least let us try. We are all agreed that there is need of closer relations between the different members of the social body. We are wont to boast, and the boast is for the most part a just one, that in our country every man's career is open before him, so that he is free to choose whichsoever he will. But, while this is true, it is also true that the means of pursuing a particular career are not given to all alike. To bring these means within reach, so far as possible, is a problem that it would be well for us all to study. Though it be true that most of our successful men, the great preachers, lawyers, physicians, the principal manufacturers and merchants, the navigators of the lakes and rivers, the cultivators of the soil, began with nothing and worked their way up by sober and laborious thrift; and that what these men have done, others in like circumstances may do; yet not all are endowed with the same vigor of body or mind, the same power of endurance, or the same strength of will. Opportunities are not equal; health may fail; an agent or a partner may prove faithless; and so it may happen, as it does often happen without one's own fault, that his foot slips, and he stumbles to the ground. A financial crisis may throw workmen out of employment. Of all the mishaps in the world, no inconsiderable number are due to accident or misfortune, or the evil contrivances of others. So it comes to pass that men willing to labor get nothing to do, and want comes to their homes. One of the saddest sights in the world is a strong and sober man, anxious for work, yet finding none.



He goes out in the morning to earn what he can, he finds nothing, and returns to his wife and children at a cold hearth and an empty table. This man may not be in the least to blame. He may be industrious and careful. When business is prosperous he has enough to do, and he provides for the needs of himself and family; but when business ceases to be prosperous, as it sometimes will in any condition of an industrious community, and most of all where laws of the land are pitted against the laws of Nature, then he suffers.

The ideal commonwealth is that in which there is not only no inequality of rights, in which not only are all protected in life, liberty, and property, but in which all have food, raiment, and shelter, and equal opportunities of pursuing their own welfare. Our aim, the aim of American republicanism, is this ideal. Hence arises one of the chief problems for the patriotic and the benevolent to study: what can be done to lessen the evil of poor wages, or no wages, and starving families? The problem assumes that the persons we are thinking of are deserving. The incurably vicious are of another class, and to be dealt with in a different manner. What we are hoping for—dreaming of, possibly—is, that all they who are able and willing to work may find work, and with it the means of improving their condition. The criminal should have another treatment, the tramp another, and the drunkard yet another. These all in their turn. For the present we are concerned only with those who are willing and ready to contribute their own labor to their own support and welfare. May it not be true that one means of affording them the opportunity of helping themselves is co-operation, and that co-operation is best obtained by private corporations?

A division of property among all the people is the dream of madmen. To take from one against his will that which he owns and give it to another, would be a violation of that instinct of justice which God has implanted in the heart of every human being; a violation, in short, of the supreme law of the Most High. But to persuade one who has much to co-operate with one who has little, for the ultimate benefit of both, is a different matter. In other words, to induce the



capitalist to take the laborer into that kind of partnership to which corporations are best adapted, may tend to the support and enrichment of both, and to the solution of that problem which now, more perhaps than any other, confronts the world.

What is co-operation? Acting together for a common end. Several families unite for the purchase of their supplies by a common agent at wholesale prices, and thus save a part at least of the profit of retail trade. This is the most common kind of co-operation. Co-operative shops are in the same category. There is likewise a co-operation to some extent of labor in the custom prevailing in some districts, of farmers assisting each other at harvests by uniting their hands and teams. There is no reason why two or more of them should not agree to work their farms together at certain seasons, and thus secure a concentration of labor and the use of more and better machinery than their separate means would warrant. This is, indeed, the only way in which they can compete with great estates, supplied with the best machinery and abundance of hands. See what the Shakers do! Strange as their religious tenets appear to us, they contrive by a union of forces to lessen their labors to such a degree that the women have finished their daily household tasks by ten o'clock in the morning. The men work more hours, but they are not overworked. They have shelter, and enough to eat, drink, and wear, for moderate and combined labor. Whaling voyages from time immemorial have been fitted out and prosecuted upon the co-operative theory, but without the aid of incorporation, as the persons employed are few and are cut off from the rest of the world during their voyages. There are establishments in France on a co-operative basis. Co-operative shops are frequent in London for different branches of the public service, the diplomatic, colonial, army, and navy, and the church.

There are, however, two difficulties in the way of all co-operative schemes that are not endowed with the corporate faculty—the uncertainty of duration, and the personal liability of members. When half a dozen persons unite in a business, each becomes liable for all the rest, and the death of one may

impede if it does not put a stop to the enterprise. Few persons are willing to place their interests without reserve in the hands of others, or make themselves liable for their engagements. A corporation offers the means of obviating these difficulties. What is a corporation? An artificial being; a creature of the law, endowed with certain functions of a natural person, and such a term of life as the law in particular cases may prescribe. The corporate property alone, unless otherwise specially provided, is held for its debts, and it lives out its appointed time though its members one after another pass away. Stability, simplicity, and the exemption of the members from personal risks, are its attributes. Is not this, then, the best machinery for the working of a co-operative scheme?

How can capital and labor be enlisted? Is there any reason why corporations created for profit that heretofore have been aggregations of capital only should not be made also aggregations of capital and labor, or, to speak more accurately, representatives of capital and labor? Let us suppose a manufacturing corporation to be formed with a view of giving to all the persons employed an interest in the profits of the establishment. Divide the nominal capital into shares of small amount, some of them payable in labor to be contributed; give to the workman credit for a part of his wages, and pay him the rest for his daily living. Is this a wild scheme? Let us see.

The plan supposes a cash capital sufficient to plant and stock the establishment, and a credit capital, payable in labor, sufficient to work it. The difference between such a plan and the present is, that the latter requires a capital payable in cash or its equivalent in other property, whereas the plan suggested requires also a credit capital payable in labor. As the business goes on now, the laborer has no interest in the capital; he works for wages fixed between him and his employer, upon a bargain in which there is no equality between the parties, in which one is to a greater or less degree in the power of the other, or at least stands in such a relation of dependence as is incompatible with that sense of self respect, that pride of manhood, which should be the patrimony of

every American citizen. Why may not the two be made to stand in the relation of equal dependence and mutual respect? Would not both be better off for the new relation? The capitalist shareholder would know that every blow of the workman was given in the interest of both, and the workman would know that every good bargain of the capitalist tended to the increase of his daily bread and the advancement of his family. Let us picture in imagination such an establishment. Let us make a sketch that, if it amounts to nothing in itself, may at least suggest something better. Suppose a manufacturing corporation to be formed with a capital of half a million dollars, divided into shares of five dollars each, three fifths of them payable in cash and the other two fifths in prospective labor; the former to be invested in land, buildings, machinery, materials for manufacture, and supplies for the consumption of the working shareholders; one hundred workmen to be received as members of the corporation, the skilled workmen to be allowed wages, say (as often now) three dollars a day, the others a dollar and a half, and each one to be inscribed in the books for four hundred shares. If the earnings were six per cent on the capital, each skilled workman would be credited in twelve months with about \$900 for wages and \$120 for profit. Deducting \$500 for his supplies—that is to say, food, clothing, and lodging—there would be left a net balance to his credit at the end of the year of \$520, which would pay for a hundred and four shares of the stock. He would then have had his living, and have become in the year the owner of a hundred and four shares of marketable stock. Next year he would acquire a hundred and four more shares, and in less than four years he would have paid for all the four hundred. The fixing of the rate of wages, the purchase of supplies, the admission or dismissal of working members, and the discipline of the establishment, should be vested in the hands of all the members, whether actual or expectant shareholders; but the financial department, the purchases and sales, should be in the hands of the actual shareholders. The great object is to bring capital and labor into closer communion, to make them lean on each other, strengthening the capitalist, and en-



abling the workman who has no capital to acquire an interest in an industrial establishment by becoming a co-worker and participant upon the pledge of his labor. To this end, the requirement of a cash or property capital must be in part dispensed with, and instead of it an engagement to labor accepted. The workman must have the means of living while he is earning the price of his shares. He must thus be enabled to live as cheaply as possible, by having all his supplies furnished at the lowest price. He must have fair wages, cheap living, the prospect of bettering his condition from a participation in the profits of the capital and labor combined. But all concerned should have the power of superintending the conduct of the workmen, dismissing the idle or incompetent, and choosing between different applicants. An account would be kept with every member, charging him with his supplies and crediting him with his wages and proportion of profits. Among the provisions for the workmen a reading-room and library might well be included.

How many persons would such a scheme benefit? According to the census of 1880 the population of the United States was then a little over fifty million, being about twenty-five and a half million males and twenty-four and a half million females. Of the males nearly ten million were under fifteen years of age, leaving fifteen and a half million above it. Subtracting from these the criminals in confinement, the hopelessly infirm, and the paupers supported at public expense, there remain a little more than fifteen million. Of these over seven million are put down as occupied in agriculture, and over three million in manufactures. A host, "an exceeding great army," engaged in the workshops and factories of the country, would thus be specially benefited by the scheme proposed.

If we were asked what inducements capitalists would have to enter into such arrangements, we should answer that, apart from the fraternal motives that are supposed to influence all the members of the human family, there are such economic reasons as these, that the scheme, if successful, would bind employer and employed closer together, lead the latter to strive more and more for the increase of the common product,



advance his self-respect, do away with strikes, give security to capital, and heal the breach between capital and labor. These ends are surely worth striving for, and the suggestions here made, though there may be little new in them, and they may appear visionary to many persons, may lead others to study more closely the great social problem of our time.

## COMPARATIVE JURISPRUDENCE OF THE ENGLISH PEOPLES.

Address at Halifax, before the Dean and Faculty of Dalhousie University,  
April, 1885.

MR. DEAN, GENTLEMEN OF THE FACULTY, LADIES AND GENTLEMEN: Though I am a stranger to you in allegiance, I am not a stranger in blood, in language, or in law. The same current flows in my veins that flows in yours, that triple stream, Anglo-Saxon-Celtic, which issuing from the two chief islands of the North Atlantic and now happily commingled, has spread over the major part of this continent, and into other lands and islands in every quarter of the world. I am one of those who, knowing well that we have had many a conflict by land and sea, yet believe that blood is thicker than water, and that the ties which bind your people and mine together are stronger than the ties which bind either of us to any other people. I confess to feeling my pulse quickened when I read, four years ago, that at the close of the celebration of the victory of Yorktown, gained a century before, the President ordered the English flag to be run aloft, and saluted by our assembled forces. It was a graceful recognition of that sympathy of lineage, which is older than governments, which survives rivalry and many alienations, and is kindled into flame at the first touch of the "electric chain with which we are darkly bound." My mother-tongue is the same that your mothers taught you—the mother-tongue of Shakespeare and Milton, of Addison and Burke, the same that will be spoken by your children and mine through innumerable ages, the living tongue of more of the human race than any ever yet known in the world. Our laws are from the same sources, however far we may retrace them, whether to Roman fountains or to the well-springs of the feudal ages. We together begin the series with the code of Alfred, and come down together through a thousand years to the Revolution of

1776. That Revolution wrought a separation of the States from the British crown, but did not work a separation in the body of our laws. We have continued as you have to cite the decisions of Mansfield and Eldon and their successors. The divergencies have been so slight, compared with the whole body, that, like the mountains of the moon, they are lost to the distant eye. Standing before this convocation, I feel that I am addressing a company of lawyers. Here I am at home. I am one of you. How can I, then, do better than to speak of that which most concerns you and me? No longer distinguished from each other by nationality, we are the same in studies and in pursuits. We are members of the same great brotherhood of jurisprudence, whose beginning was at the cradle of civilization, and whose ending will be at its grave, and whose roll of members contains so many illustrious names. Our studies embrace the history of the race, with all its institutions, and our pursuits affect all the relations and duties of life. When Evangeline and her lover met in the Indian-summer evening for the ceremony of betrothal, the notary came to put into form and sanction with the law what their hearts had thought and their lips had uttered in the soft twilight or beneath the moon. Whenever now the church-bell in an Acadian valley rings out welcome to the bridal, the law comes also to witness and sanction the most sacred of relations. And when at last approaches the hour of burial, the law is there too, to see that the sacred rites are duly and decently performed. Not a ship sails out of this ample harbor but bears with it the laws of its country; not a city is founded, nor a house built, nor an acre sold in all this land, without the presence of the law. Though law and jurisprudence are not convertible terms, they are often used in the same sense. The latter is the science, which treats of the law and explains it, the former is the formulated precept. When Coke speaks of "the gladsome light of jurisprudence," he means both the science and the precept. In this sense I use the word, when I say that the whole domain of jurisprudence is spread before us. We are to study and are to practice. The range of our studies is as wide as the history of the race; the range of our practice takes in all

human interests. We go back to the beginning of civilization, we look forward into future times. We see men emerging from barbarism, clinging together at first in families, then forming groups of families, and finally extending into tribes, and from tribes into states and nations. We see everywhere traces of law. There was a law of the family before there was a law of the tribe. Association of even the loosest kind required some order, and order required laws. They were transmitted by tradition and enforced by usage, until men learned to write their words, and then they wrote their laws; and, not only did they commit them to writing, but they wrote them on the things most imperishable—on tables of stone and bronze. The tradition has perished, but the written record remains. We have thus in view the laws of Moses, the twelve tables of Rome, codes old and new, pretorian edicts, ordinances of kings, statutes of parliaments, acts of congresses. Nothing that can be known of the rules which men have framed for their social government is foreign to our researches.

The true ideal of a lawyer is one who is master of the laws of his own country, and a student of other laws, as they may serve to elucidate or improve his own; a faithful adviser, a fearless defender, prompt to make use of his learning and opportunities not only for the protection of his own clients, but for the improvement of the laws themselves, whenever he finds them the instruments of injustice. Fidelity to his clients and to the courts is a duty on which we need not dwell, for it is constantly asserted and never denied. But the duty to improve the system under which he lives and practices, wherever capable of improvement, is not so generally insisted upon or believed. It is supposed to be enough for a lawyer to know the laws of his own country, advise his clients aright, and deal fairly with the courts. But this I insist is not enough. The laws themselves are not seldom imperfect or unjust, and, whenever they are so, I insist upon the duty of those who know them best, and know best how to improve them, to make their knowledge available for the public good. Now, the moment that the duty is admitted, it becomes us to seek the best means of performing it. These means are in



part our own study and experience, and in part the example of others. Hence the importance of comparative jurisprudence. There is, indeed, another advantage of it, on which I do not mean now to dwell, the use we make of it in the study of the past as a means of elucidating the present.

The jurisprudence of a people is an epitome of their history better than the annals of siege or battle. The real significance of the present is best understood when considered in connection with the past. But I am now speaking of comparative jurisprudence as the means of serving us in the future. Why should we not avail ourselves of the improvements of our neighbors in the laws, as we do in mechanics and the arts? An invention which is successful in your country we turn to our account, if we can, and you in your turn make use of ours. It is in half-barbarous countries only that men refuse to profit by what others have done. In Egypt and Palestine you may see laborers toiling with the rude plow of forgotten ages, neither knowing nor caring to know the inventions by which their toils might be lessened. China yet clings in all her provinces to the implements, the vehicles, and the roads of the old time. The Western nations are of a different mind, and pursue a different policy. No sooner have one people found out a new industry, or the means of making an old industry more productive, than others make haste to avail themselves of the same. How many abuses and errors yet flourish among us which other communities have already routed out, as in the government of municipalities, the management of prisons and reformatories, the treatment of the insane, the making of roads and bridges, the building of houses, the pavement of streets, and the cultivation of the soil! Insomuch, then, as we are swift to take advantage of each other's progress in industrial pursuits, let us do the same in that greatest of all sciences and arts, the science and art of government and legislation. Let us see who can enact the best laws; who can make justice the most accessible, most certain, and least costly. It will be sufficient for my present purpose to bespeak a comparison of the jurisprudence of the English-speaking peoples. No doubt it would be useful to compare ours with the jurisprudence of the Latin and Teu-

tonic nations, but I confine my observations to our own branch of the human family, which I think may best be denominated the Anglo-American, and which bears the most distinctive character, inasmuch as the Teutonic has a larger infusion of the Latin element than has our own. The people who speak the English tongue are bound together not only by the tie of language, but by institutions, usages, and pursuits. By institutions I mean not only agencies of government, but of enterprise, and even of charity.

In matters of government we are much the same; rather I should say we have more in common than of separate possession. Your supreme executive is hereditary, ours is elective; in the mother-country one chamber of the Legislature is hereditary, ours are both elective. These are our chief differences. You have two chambers and one executive; so have we. Your inferior magistracy and ours are fashioned after the same pattern. When you form a federal union you define the limits of the central government and preserve in great measure the autonomy of the different provinces. We have done the same, only that our States, if I do not mistake, are more independent than your provinces. Our laws, as I have said, have a close resemblance—so close, indeed, that if you take up a volume of our statutes and a volume of yours, you will see that, barring some official language, the same subject is treated in much the same manner. Our social habits are less dissimilar even than our institutions. Our pursuits are almost identical. We engage in the same industries, and we traverse sea and land to find new avenues of trade. As we are rivals in trade, why not in legislation also? Each state or government—federal, imperial, or local—each province has its own thinkers and workers, its own legislature, judiciary, and magistracy, and these will have developments of their own. It must, therefore, be useful to compare the progress of one with the progress of the others. Each will thus profit from the study and experience of the rest. We are all supposed to be seeking the same end—that is, the well-being of our respective communities. So, instead of studying and working by ourselves, in isolation, let us not only do our own study and work, but take to our profit the studies

and work of all the rest. We are all using similar materials, and all seeking similar results. Assuming, then, the value of comparative jurisprudence, and, most of all, among English-speaking people, let me devote the remainder of this lecture to these particular topics to which, I think, the attention of our people is just now most directed—condensation, simplicity, and uniformity in our laws. The time and the place seem especially appropriate. A century has passed since the American Revolution. The bitterness of that struggle has been washed out in the current of three generations. Later differences, such as they were, have been forgotten. We stand here almost in the gateway of the East, the nearest of the great seaports to the fatherland, and in that peninsula of Acadia, which the genius of our Longfellow has made as familiar to us as the shores of old romance. Above all, we are moving on the current of that tide in the affairs of men lately turned from its ebb to the flood, which is now setting toward more frequent intercourse, closer relations, and greater sympathy between the different branches of the human family. We can now especially help one another. Here is a rivalry worthy of ourselves. “Let the dead past bury its dead; act, act in the living present.” Let us see how much we can do for each other, and how much we can learn, each from each. First of all, take the subject of condensation. The demand for it is urgent; the need of it is manifest. Men are busier than they were; the claims upon their time are greater. In short, they are all striving to do more in less time. Now, condensation is to be obtained only through codification. Multiplication of details leads to confusion, and confusion to uncertainty and waste of days. But I am not here to plead the cause of codification. I will only repeat what was said lately by the London “Law Times,” on the occasion of an address by the London Chamber of Commerce to the lord-chancellor, “asking for a code of commercial law, that the common law has now reached a stage of its development at which codification sets in as a natural and inevitable process, and when, for good or bad, this process has once begun, its completion is only a matter of time”; and I will add for myself that every reason which can be given for formulating a civil



claim or a criminal charge, is a reason for formulating the rules of law which sustain the one or the other. Indeed, the reason is the stronger, since the law must precede the infringement of it, and a knowledge of that will lessen the occasion for subsequent processes. My present purpose is rather to show how much we can aid each other in the way of codification than to show the need of it. We had the example of a Code of Louisiana before we began codification of the common law. You have the example of a code in the province of Quebec, where the Roman law has prevailed from the beginning of the French domination. Every good code, or part of a code of Anglo-American law, may be used, and indeed is certain to be used, as encouragement to other Anglo-American people. In the matter of procedure the process has been going on with marvelous rapidity. The New York code of civil procedure made its way against dogged opposition and malignant criticism, until it has been adopted by a majority of the States and Territories of the American Union, and its principles obtained such favor in England as to become the basis of the English judicature act, and then spreading from England and Ireland into the dependencies, they guide, at this moment, the civil procedure of more than half the English-speaking world. You in Nova Scotia have just written it in the book of your laws. So much for condensation and order. Next as to simplicity. In their best state the laws of every land must be as various as the interests of its inhabitants, and must provide for all personal relations, for all kinds of property, and for all transactions. Where so much is of necessity extended and complex, it is most important that the extent and complexity should not be increased by unnecessary variations and distinctions. By way of example, I will mention two instances, one of the seal to a writing, and another of the difference between real and personal property in respect of its devolution upon the death of the owner. The distinction between sealed and unsealed instruments is as old as the law, but the reason for it ceased long ago. The seal was never anything but the substitute for a signature, and came from the time when few could write. Now, when writing is common, every instrument is signed, and the signature is used to



verify the seal, instead of the seal being used to verify the writing. Still, the distinction is kept up. A grant of land must be under seal; various other documents must have seals; the seal is held to be evidence of a good consideration; but, so convinced are most men of its being the merest form, that, in many places, a scrawl is deemed as good as a seal. A piece of paper is brought to a land-owner in one of our States, which purports to be a conveyance of land; the owner puts his name to it, and makes no sign with his pen after the name; the paper is now worthless; but if he makes a scrawl or scratch after his name, the paper conveys away his estate. What folly! It would be just as rational for the man to open one eye and shut the other, or make a flourish with his fingers after signing, as to scrawl with his pen. And yet, year after year, indeed, century after century, goes by and the ridiculous ceremony is repeated day by day, and many times a day; rights are affected by it, remedies are made dependent upon it. We have, in the State of New York, eleven thousand lawyers; in the United States, seventy thousand; and, so far as I know, not one has ever moved so much as his little finger to wipe this blot from the jurisprudence of his country. What I here say of my country I suppose can be said of yours. Turn now to the devolution of estates. Upon the death of an owner, one part, the real estate, goes to the heir, another part, the personal estate, goes to the executor. Hence diverge two important branches of the law, various in their details, involving a great deal of learning, and producing many inconveniences. And for what reason? Only because, in the feudal system, the ownership of the soil was the tie which bound together the different orders of the State. The laws which governed the ownership were subtle contrivances of the middle ages, and have long ago lost all their appropriateness, and with it their reason and their significance. I need mention only one of the inconveniences of the present system—that it throws a shadow of uncertainty over many titles. When an owner of an estate dies, it should be certain to whom his estate descends, but, so long as the title goes with the blood, it can not be certain, because it is impossible to know with certainty who are the heirs. Whether the owner

was married is the first question ; whether if married he had any, and if so how many children, is the second ; and whether the children are living, and if so where they are, is the third, and so on. There is no record of heirship. As to personal property there can be no uncertainty about the title. It goes to the executor or administrator ; his office is matter of record. Everybody knows who he is. Here, then, is work for the law reformers. Lastly, as to uniformity. When men lived in isolated communities it was of little moment whether the laws of one community were unlike those of the others ; but, now that we have exchanged the policy of isolation for the policy of intercourse, when the people of one nation have interests so great in others, when commerce spreads over the whole world, and ships ply over seas as ferry-boats once plied over rivers, when men come and go from country to country as formerly they went from city to city, it is most desirable, not to say indispensable, that they should not change laws as often as they change countries. Voltaire said of the France of his time that travelers changed their laws as often as they changed their horses. This might have been said fifty years ago of the different countries of America and Europe. Now, happily, there is a tendency to uniformity, and I will close what I have to say on this topic in mentioning two instances where uniformity is most needed—marriage and divorce. The relation of husband and wife is the first and most sacred of the personal relations. In its train follow the comforts of home, the group of children, the cheerful fireside, the domestic altar. It creates the family, and the family is the foundation of the state. If there be any doubt about the existence of the relation, there is doubt about all its consequences. It is, then, of the first necessity that a man should know of a certainty who is his wife, and that a woman should know of a certainty who is her husband. And yet, strange to say, there is uncertainty in instances not a few. When a widower in Australia leads to the altar his deceased wife's sister, they are man and wife so long as they rest under the Southern Cross, but if ever they sail northward, into the light of Arcturus, their relation becomes unlawful. Then suppose two persons to be lawfully married, and one of them to obtain a divorce, there may be

doubts about its legality. Whether the court which granted the divorce had jurisdiction to grant it may be drawn in question in different places and with different results. Such distressing questions do arise, and much too frequently, as lawyers have occasion to know.

On the Continent of Europe they have led to a deal of suffering and an infinity of scandal. The story of the Princess Bibesco, bandied about between French and German courts, reads like a romance. Now, it is the province of comparative jurisprudence to study the marriage and divorce laws of the different countries with a view to the establishment of one rule everywhere for both. The conflict of laws on these subjects is a disgrace to Christendom. For my own part, I would have it established, as a universal rule of our civilization, that the marriage in any country of one man with one woman should be a valid marriage everywhere, and that a divorce granted in any country by a competent court having jurisdiction over both parties should be a valid divorce in every other place. But I would define carefully the conditions of jurisprudence. With this enumeration I must end my examples of the questions which lie within the domain of comparative jurisprudence, and which are pressing for solution. Let me now, in closing, make my respectful salutations to this University of Dalhousie, under whose auspices I have been speaking, which, founded more than half a century ago by a former governor of this province, afterward Governor-General of India, is now entering, as I am informed, upon a new career of prosperity and honor. Let me express my hope that its prosperity and honor may be commensurate with your wishes, that it may help to educate the youth of this fair province of Acadia, and of all this wide dominion in the ways of sound learning and manly virtue, and may prove a powerful instrument in promoting that study of comparative jurisprudence, on which I have been insisting, and thus hasten the coming of that future time when "*Non erit alia lex Romæ alia Athenis, alia nunc, alia posthæc, sed et omnes gentes, et omni tempore una lex, et sempiterna, et immortalis continebit.*"



## LAND AND TAXATION.

A Talk with Mr. Henry George, in the "North American Review," July, 1885.

MR. DAVID DUDLEY FIELD. Will you explain to me how you expect to develop, in practice, your theory of the confiscation of land to the use of the state?

MR. HENRY GEORGE. By abolishing all other taxes, and concentrating taxation upon land-values.

F. Then suppose A to be the proprietor of a thousand acres of land on the Hudson, chiefly farming-land, but at the same time having on it houses, barns, cattle, horses, carriages, furniture; how is he to be dealt with, under your theory?

G. He would be taxed upon the value of his land, and not upon the value of his improvements and stock.

F. Whether the value of his land has been increased by his cultivation or not?

G. The value of land is not really increased by cultivation. The value that cultivation adds is a value of improvement, which I would exempt. I would tax the land at its present value, excluding improvements; so that such a proprietor would have no more taxes to pay than the proprietor of one thousand acres of land, equal in capabilities, situation, etc., that remained in a state of nature.

F. But suppose the proprietor of such land to have let it lie waste for many years, while the farmer that I speak of has devoted his time and money to increasing the value of his thousand acres, would you tax them exactly alike?

G. Exactly.

F. Let us suppose B, an adjoining proprietor, has land that has never yielded a blade of grass, or any other product but weeds; and that A, a farmer, took his in the same condition when he purchased, and by his own thrift and expenditure has improved his land, so that now, without buildings,



furniture, or stock, it is worth five times as much as B's thousand acres; B is taxed at the rate of a dime an acre; would you tax A at the rate of a dime an acre?

G. I would certainly tax him no more than B, for by the additional value that A has created he has added that much to the common stock of wealth, and he ought to profit by it. The effect of our present system, which taxes a man for values created by his labor and capital, is to put a fine upon industry, and repress improvement. The more houses, the more crops, the more buildings in the country, the better for us all, and we are doing ourselves an injury by imposing taxes upon the production of such things.

F. How are you to ascertain the value of land considered as waste land?

G. By its selling price. The value of land is more easily and certainly ascertained than any other value. Land lies out-of-doors, everybody can see it, and in every neighborhood a close idea of its value can be had.

F. Take the case of the owner of a thousand acres in the Adirondack wilderness that have been denuded of trees, and an adjoining thousand acres that have a fine growth of timber. How would you value them?

G. Natural timber is a part of land; when it has value, it adds to the value of the land.

F. The land denuded of timber would then be taxed less than land that has timber?

G. On general principles it would, where the value of the land was therefore lessened. But where, as in the Adirondacks, public policy forbids anything that would hasten the cutting of timber, natural timber might be considered an improvement, like planted timber, which should not add to taxable value.

F. Then suppose a man to have a thousand acres of wild timber-land, and to have cut off the timber, and planted the land, and set up buildings, and generally improved it; would you tax him less than the man that has retained his land with the timber still on?

G. I would tax the value of his land irrespective of the improvements made by him, whether they consisted in clear-

ing, in plowing, or in building. In other words, I would tax that value which is created by the growth of the community, not that created by individual effort. Land has no value on account of improvements made upon it, or on account of its natural capabilities. It is as population increases, and society develops, that land-values appear, and they rise in proportion to the growth of population and social development. For instance, the value of the land upon which this building stands is now enormously greater than it was years ago, not because of what its owner has done, but because of the growth of New York.

F. I am not speaking of New York city in particular; I am speaking of land generally.

G. The same principle is generally true. Where a settler takes up a quarter-section on a Western prairie, and improves it, his land has no value so long as other land of the same quality can be had for nothing. The value he creates is merely the value of improvement. But when population comes, then arises a value that attaches to the land itself. That is the value I would tax.

F. Suppose the condition of the surrounding community in the West remained the same; two men go together and purchase two pieces of land of a thousand acres each; one leaves his with a valuable growth of timber, the other cuts off the timber, cultivates the land, and makes a well-ordered farm. Would you tax the man that has left the timber upon his land more than you would tax the other man, provided that the surrounding country remained the same?

G. I would tax them both upon the value of the land at the time of taxation. At first, I take it, the clearing of the land would be a valuable improvement. On this, as on the value of his other improvements, I would not have the settler taxed. Thus taxation upon the two would be the same. In course of time, the growth of population might give value to the uncut timber, which, being included in the value of land, would make the taxation upon the man that had left his land in a state of nature heavier than upon the man that had converted his land into a farm.

F. A man that goes into the Western country and takes up

land, paying the Government price, and does nothing to the land; how is he to be taxed?

G. As heavily as the man that has taken a like amount of land and improved it. Our present system is unjust and injurious in taxing the improver and letting the mere proprietor go. Settlers take up land, clear it, build houses, and cultivate crops, and for thus adding to the general wealth are immediately punished by taxation upon their improvements. This taxation is escaped by the man that lets his land lie idle, and, in addition to that, he is generally taxed less upon the value of his land than are those who have made their land valuable. All over the country, land in use is taxed more heavily than unused land. This is wrong. The man that holds land and neglects to improve it, keeps away somebody that would, and he ought to pay as much for the opportunity he wastes as the man that improves a like opportunity.

F. Then you would tax the farmer whose farm is worth \$1,000 as heavily as you would tax the adjoining proprietor, who, with the same quantity of land, has added improvements worth \$100,000: is that your idea?

G. It is. The improvements made by the capitalist would do no harm to the farmer, and would benefit the whole community, and I would do nothing to discourage them.

F. In whom would you have the title to land vested—in the state, or in individuals as now?

G. I would leave land-titles as at present.

F. Your theory does not touch the title to land, nor the mode of transferring the title, nor the enjoyment of it; but it is a theory confined altogether to the taxing of it?

G. In form. Its effect, however, if carried as far as I would like to carry it, would be to make the community the real owner of land, and the various nominal owners virtually tenants, paying ground-rent in the shape of taxes.

F. Before we go to the method by which you would effect that result, let me ask you this question: A, a large landlord in New York, owns a hundred houses, worth each, say, \$25,000 (scattered in different parts of the city); at what rate of valuation would you tax him?

G. On his houses, nothing. I would tax him on the value of the lots.

F. As vacant lots?

G. As if each particular lot were vacant, surrounding improvements remaining the same.

F. If you would have titles as now, then A, who owns a ten-thousand-dollar house and lot in the city, would still continue to be the owner, as he is at present?

G. He would still continue to be the owner, but as taxes were increased upon land-values he would, while still continuing to enjoy the full ownership of the house, derive less and less of the pecuniary benefits of the ownership of the lot, which would go in larger and larger proportions to the state, until, if the taxation of land-values were carried to the point of appropriating them entirely, the state would derive all those benefits, and, though nominally still the owner, he would become in reality a tenant with assured possession, so long as he continued to pay the tax, which might then become in form, as it would be in essence, a ground-rent.

F. Now, suppose A to be the owner of a city lot and building, valued at \$500,000; who would give a deed to it to B?

G. A would give the deed.

F. Then supposing A to own twenty lots, with twenty buildings on them, the lots being, as vacant lots, worth each \$1,000, and the buildings being worth \$49,000 each; and B to own twenty lots of the same value as vacant lots, without any buildings; would you tax A and B alike?

G. I would.

F. Suppose that B, to buy the twenty lots, had borrowed the price, and mortgaged them for it; would you have the tax in that case apportioned?

G. I would hold the land for it. In cases in which it became necessary to consider the relations of mortgagee and mortgagor, I would treat them as joint owners.

F. If A, the owner of a city lot with a house upon it, should sell it to B, do you suppose that the price would be graduated by the value of the improvements alone?

G. When the tax upon the land has reached the point of taking the full annual value, it would.



F. To illustrate: Suppose A has a city lot, which, as a vacant lot, is worth annually \$10,000, and there is a building upon it worth \$100,000, and he sells them to B; you think the price would be graduated according to the value of the building, that is to say, \$100,000, after the taxation had reached the annual value of \$10,000?

G. Precisely.

F. To what purposes do you contemplate that the money raised by your scheme of taxation should be applied?

G. To the ordinary expenses of government, and such purposes as the supplying of water, of light, of power, the running of railways, the maintenance of public parks, libraries, colleges, and kindred institutions, and such other beneficial objects as may from time to time suggest themselves; to the care of the sick and needy, the support of widows and orphans, and, I am inclined to think, to the payment of a fixed sum to every citizen when he came to a certain age.

F. Do you contemplate that money raised by taxation should be expended for the support of the citizen?

G. I see no reason why it should not be.

F. Would you have him fed and clothed at the public expense?

G. Not necessarily; but I think a payment might well be made to the citizen when he came to the age at which active powers decline, that would enable him to feed and clothe himself for the remainder of his life.

F. Let us come to practical results: The rate of taxation now in the city of New York, we will suppose, is 2·30 upon the assessed value. The assessed value is understood to be about sixty per cent of the real value of property. Land assessed at \$60,000 is really worth \$100,000, and being assessed at 2·30 when valued at \$60,000, should be assessed at about 1·40 on the real value; you would increase that amount indefinitely, if I understand you, up to the annual rental value of the land?

G. I would.

F. Which we will suppose to be five per cent; is that it?

G. Let us suppose so.

F. Then your scheme contemplates the raising of five per

cent on the true value of all real estate as vacant land, to be used for the purposes you have mentioned. Have you thought of the increase in the army of office-holders that would be required for the collection and disbursement of this enormous sum of money?

G. I have.

F. What do you say to that?

G. That, as to collection, it would greatly reduce the present army of office-holders. A tax upon land-values can be levied and collected with a much smaller force than is now required for our multiplicity of taxes; and I am inclined to think that, directly and indirectly, the plan I propose would permit the dismissal of three fifths of the officials needed for the present purposes of government. This simplification of government would do very much to purify our politics; and I rely largely upon the improvement that the change I contemplate would make in social life, by lessening the intensity of the struggle for wealth, to permit the growth of such habits of thought and conduct as would enable us to get for the management of public affairs as much intelligence and as strict integrity as can now be obtained for the management of great private affairs.

F. Supposing it to be true that you would reduce the expense of collection, would you not, for the disbursement of these vast funds, require a much larger number of efficient men than are now required?

G. Not necessarily. But, whether this be so or not, the full scheme I propose can only be attained gradually. Until, at least, the total amount needed for what are now considered purely governmental purposes were obtained by taxation upon land-values, there would be a large reduction of office-holders, and no increase.

F. How do you propose to divide the taxation between the state and the municipalities?

G. As taxes are now divided. As to questions that might arise, there will be time enough to determine them when the principle has been accepted.

F. Your theory contemplates the raising of nearly four times as much revenue in the State of New York as is now

raised ; how many office-holders would it require to disburse this enormous sum of money among the various objects that you have mentioned ?

G. My theory does not require that it should be disbursed among the objects I have mentioned, but simply that it should be used for public benefit.

F. Do you not think that the present rate of taxation is more than sufficient for all purposes of government ?

G. Under the state of society that I believe would ensue, it would be much more than sufficient for present purposes of government. We should need far less for expenses of revenue collection, police, penitentiaries, courts, almshouses, etc.

F. Then, to bring the matter down to a point, you propose for the present no change whatever in anything, except that the amount now raised by all methods of taxation should be imposed upon real estate considered as vacant ?

G. For a beginning, yes.

F. Well, what do you contemplate as the ending of such a scheme ?

G. The taking of the full annual value of land for the benefit of the whole people. I hold that land belongs equally to all, that land-values arise from the presence of all, and should be shared among all.

F. And this result you propose to bring about by a tax upon land-values, leaving the title, the privilege of sale, of rent, of testament, the same as at present ?

G. Yes.

F. Your theory appears to me impracticable. I think that the raising of such an enormous sum of money, placing it in the coffers of the state, to be disbursed by the state in the manner you contemplate, would tend to the corruption of the government beyond all former precedent. The end you contemplate—of bettering the condition of all the people—is a worthy one. I believe that we—you and I—who are well to do in the world, and others in our condition, do neglect and have neglected our duty to those in a less fortunate condition, and that it is our highest duty to endeavor to relieve, so far as we can, the burdens of those who are now suffering from poverty and want. Therefore, far from deriding or

scouting your theory, I examine it with respect and attention, desirous of getting from it whatever I can that may be good, while rejecting what I conceive to be erroneous. Taken altogether, as you have explained it, I do not see that it is a practicable scheme.

G. But your objections to it as impracticable only arise at the point, yet a long distance off, at which the revenues raised from land-values would be greater than those now raised. Is there anything impracticable in substituting, for the present corrupt, demoralizing, and repressive methods of taxation, a single tax upon land-values?

F. I think it possible to concentrate all taxation upon land, if that should be thought the best method. Many economists are of opinion that taxes should be raised from land alone, conceiving that rent is really paid by every consumer, but they include in land everything placed upon it out of which rent comes.

G. Then we could go together for a long while, and, when the point was reached at which we would differ, we might be able to see that a purer government than any we have yet had might be possible. Certainly here is the gist of the whole problem. If men are too selfish, too corrupt, to co-operate for mutual benefit, there must always be poverty and suffering.

F. My theory of government is, that its chief function is to keep the peace between individuals, and allow each to develop his own nature for his own happiness. I would never raise a dollar from the people except for necessary purposes of government. I believe that the demoralization of our politics comes from the notion that public offices are spoils for partisans. A large class of men has grown up among us whose living is obtained from the state, that is to say, out of the people; we must get rid of these men, and, instead of creating offices, we must lessen their number.

G. I agree with you as to government in its repressive feature; and in no way could we so lessen the number of office-holders and take the temptation of private profit out of public affairs as by raising all public revenues by the tax upon land-values, which, easily assessed and collected, does not



offer opportunities for evasion or add to prices. Though in form a tax, this would be in reality a rent; not a taking from the people, but a collecting of their legitimate revenues. The first and most important function of government is to secure the full and equal liberty of individuals; but the growing complexity of civilized life, and the growth of great corporations and combinations before which the individual is powerless, convince me that government must undertake more than to keep the peace between man and man, must carry on, when it can not regulate, businesses that involve monopoly, and in larger and larger degree assume co-operative functions. If I could see any other means of doing away with the injustice involved in growing monopolies, of which the railroad is a type, than by extension of governmental functions, I should not favor that; for all my earlier thought was in the direction you have indicated—the position occupied by the Democratic party of the last generation. But I see none. However, if it were to appear that further extension of the functions of government would involve demoralization, then the surplus revenue might be divided per capita. But it seems to me that there must be in human nature the possibility of a reasonably pure government, when the ends of that government are felt by all to be the promotion of the general good.

F. I do not believe in spoliation, and I conceive that that would be spoliation which would take from one man his property and give it to another. The scheme of the communists, as I understand it, appears to me to be not only unsound, but destructive of society. I do not mean to intimate that you are one of the communists; on the contrary, I do not believe you are.

G. As to the sacredness of property, I thoroughly agree with you. As you say in your recent article on "Industrial Co-operations" in the "North American Review," "To take from one against his will that which he owns, and give it to another, would be a violation of that instinct of justice which God has implanted in the heart of every human being; a violation, in short, of the supreme law of the Most High"; and my objection to the present system is that it does this. I

hold that that which a man produces is rightfully his, and his alone; that it should not be taken from him for any purpose, even for public uses, so long as there is any public property that might be employed for that purpose; and therefore I would exempt from taxation everything in the nature of capital, personal property or improvements, in short, that property which is the result of man's exertion. But I hold that land is not the rightful property of any individual. As you say again, "no one can have private property in privilege," and if the land belongs, as I hold it does belong, to all the people, the holding of any part of it is a privilege for which the individual holder should compensate the general owner according to the pecuniary value of the privilege. To exact this would not be to despoil any one of his rightful property, but to put an end to spoliation that now goes on. Your article in the "Review" shows that you see the same difficulties I see, and would seek the same end—the amelioration of the condition of labor, and the formation of society upon a basis of justice. Does it not seem to you that something more is required than any such scheme of co-operation as that which you propose, which at best could be only very limited in its application, and which is necessarily artificial in its nature?

F. Undoubtedly. The hints that I have given in the article to which you refer, would affect a certain number of persons, not by any means the whole body politic. I conceive that a great deal more is necessary. There should be more sympathy, more mutual help. I think, as I have said, that we are greatly wanting in our duty to all the people around us, and I would do everything in my power to aid them and their children. I do not think that we have arrived at the true conception of our duty, of the duty of every American citizen to all other American citizens.

G. I think you are right in that; but does it not seem as though it were out of the power of mere sympathy, mere charity, to accomplish any real good? Is it not evident that there is at the bottom of all social evils an injustice, and until that injustice is replaced by justice, charity and sympathy will do their best in vain? The fact that there are among us

strong, willing men unable to find work by which to get an honest living for their families, is a most portentous one. It speaks to us of an injustice that, if not remedied, must wreck society. It springs, I believe, from the fact that, while we secure to the citizen equal political rights, we do not secure to him that natural right more important still, the equal right to the land on which and from which he must live. To me it seems clear, as our Declaration of Independence asserts, that all men are endowed by their Creator with certain unalienable rights, and that the first of these rights—that which, in fact, involves all the rest, that without which none of the others can be exercised—is the equal right to land. Here are children coming into life to-day in New York; are they not endowed with the right to more than to struggle along as they best can in a country where they can neither eat, sleep, work, nor lie down without buying the privilege from some of certain human creatures like themselves, who claim to own, as their private property, this part of the physical universe, from the earth's center to the zenith?

F. I was not speaking of charity, but of sympathy leading to help—helping one to help himself—that is the help I mean, and not the charity that humbles him.

G. Then I cordially agree with you, and I look upon such sympathy as the most powerful agency for social improvement. But sympathy is little better than mockery until it is willing to do justice, and justice requires that all men shall be placed upon an equality so far as natural opportunities are concerned.

F. How would you secure that equality? Take the case of a child born to-day in a tenement-house, in one of those rooms that are said to be occupied by several families; and another child born at the same time in one of the most comfortable homes in our city. The parents of the first are wasteful, intemperate, filthy; the parents of the second are thrifty, temperate, cleanly; how would you secure equality in opportunities of the first child with the second?

G. Equality in all opportunities could not be secured; virtuous parents are always an advantage, vicious parents a disadvantage; but equality of natural opportunities could be secured in the way I have proposed. And in a civilization



where the equal rights of all to the bounty of their Creator were recognized, I do not believe there would be any tenement-houses, and very few, if any, parents such as those of which you speak. The vice and crime and degradation that so fester in our great cities are the effects, rather than the causes, of poverty.

F. The principle announced in the Declaration of Independence to which you have referred is one of the cardinal principles of American government—the unalienable right of all men to “life, liberty, and the pursuit of happiness.” That, however, does not mean that all men are equal in opportunities or in positions. A child born to-day is entitled to the labors of his parents, or rather to the products of their labor, just as much as they are entitled to it, until he is able to take care of himself. One of the incentives to labor is to provide for the children of the laborer. The aim of our American civilization ought to be to furnish, so far as can be done rightfully, to every child born into the world, an equal opportunity with every other child, to work out his own good. This, however, is the theoretical proposition. It is impossible in practice to give to every child the same opportunity; what we should aim at is, to approximate to that state of things; this is the work of the philanthropist and Christian. In short, my belief is, that the truest statement of political ethics and political economy is to be found in the doctrines of the Christian religion.

G. In that I thoroughly agree with you. But Christianity that does not assert the natural rights of man, that has no protest when the earth which it declares was created by the Almighty as a dwelling-place for all his children is made the exclusive property of some of them, while others are denied their birthright—seems to me a travesty. A Christian has something to do as a citizen and law-maker. We must rest our social adjustments upon Christian principles if we would have a really Christian society. But to return to the Declaration of Independence, the equal right to life, liberty, and the pursuit of happiness; does it not necessarily involve the equal right to land, without which neither life, liberty, nor the freedom to pursue happiness is possible?



F. You do not propose to give to every child a piece of land; you only propose to secure its right, if I understand you, by taxing land as vacant land in the mode you propose?

G. That is all, but it is enough. In the complex civilization we have now attained it would be impossible to secure equality by giving to each a separate piece of land, or to maintain that equality, even if once secured; but by treating all lands as the property of the whole people, we would make the whole people the landlords, and the individual users the tenants of all, thus securing to each his equal right.

F. In how long a time, if you were to have such legislation as you would wish, do you think we should arrive at the condition that you have mentioned?

G. I think immediately a substantial equality would be arrived at, such an equality as would do away with the spectacle of a man unable to find work, and would secure to all a good and easy living with a mere modicum of the hard labor and worriment now undergone by most of us. The great benefit would not be in the appropriation to public use of the unearned revenues now going to individuals, but in the opening of opportunities to labor, and the stimulus that would be given to improvement and production by the throwing open of unused land and the removal of taxation that now weights productive powers. And with the land made the property of the whole people, all social progress would be a progress toward equality. While other values tend to decline as civilization progresses, the value of land steadily advances. Such a great fact bespeaks some creative intent; and what that intent may be, it seems to me we can see when we reflect that if this value—a value created not by the individual, but by the whole community—were appropriated to the common benefit, the progress of society would constantly tend to make less important the difference between the strong and the weak, and thus, instead of those monstrous extremes toward which civilization is now hastening, would bring about conditions of greater and greater equality.

F. As a conclusion of the whole matter, if I understand this explanation of your scheme, it is this: that the state

should tax the soil, and the soil only; that in doing so it should consider the soil as it came from the hands of the Creator, without anything that man has put upon it; that all other property—in short, everything that man has made—is to be acquired, enjoyed, and transmitted as at present; that the rate of annual taxation should equal the rate of annual rental; and that the proceeds of the tax should be applied not only to purposes of government, but to any other purposes that the Legislature from time to time may think desirable, even to dividing them among the people at so much a head.

G. That is substantially correct.

F. I am glad to hear your explanation, though I do not agree with you, except as I have expressed myself.

## JUDICIAL DELAYS.

Reports to the American Bar Association of the special committee appointed to consider and report whether the present delay and uncertainty in judicial administration can be lessened, and if so, by what means. August 19, 1885.

### FIRST REPORT.

#### *To the American Bar Association :*

THE special committee, appointed by the Association at its last meeting to report at this one, whether the present delay and uncertainty in judicial administration can be lessened, and if so, by what means, have the honor to report as follows :

The resolution assumes that delay and uncertainty in the administration of justice do exist, and the assumption is unfortunately too true. The law's delay has been a reproach from time immemorial. In the Great Charter, extorted from King John more than six hundred years ago, a solemn promise was made for himself and his heirs that they would "sell or deny or defer right or justice to no man." And, in respect of the most important litigation that could then arise, the further promise was made :

"We or (if we are out of the realm) our chief justiciary shall send two justiciaries through every county four times a year, who, with the four knights chosen out of every shire by the people, shall hold the said assizes in the county on the day and at the place appointed. And if any matters can not be determined on the day appointed to hold the assizes in each county, so many of the knights and freeholders as have been at the assizes aforesaid shall be appointed to decide them as is necessary, according as there is more or less business."

There was, furthermore, this stipulation :

"We will not make any justiciaries, constables, sheriffs, or bailiffs but such as are knowing in the laws of the realm and are disposed duly to observe it."

Four hundred years after these fruitless promises, Shakespeare made the Prince of Denmark count the law's delay

among the ills of life. And the name of the "*salle des pas perdus*" is now, as it has been for ages, the sad jest of waiting and weary suitors in France.

The evils of delay and uncertainty every lawyer knows very well, and every suitor knows better. If the chief end of government be, as is often asserted, the dispensation of justice, whatever hinders or embarrasses the attainment of that end is an evil of corresponding magnitude. Society can indeed exist, as it has often existed, where judicial administration is uncertain, weak, or corrupt; but the effect upon public morals and national prosperity will be, as it has always been, disastrous. It is the concurrent testimony of all history that no country has ever maintained itself long in healthy prosperity where the people felt that their rights were not safe under the law. The insecurity of life and property which a dilatory or uncertain administration of justice entails operates as a blight upon enterprise and frightens away not only the timid, but all, even the boldest, who desire to dwell in peace and safety. These alternatives are presented to every political society—justice or violence. If the public authorities can not provide by peaceful means for the prevention or redress of wrong, private associations will undertake a part of the task, and violence will essay to do the rest. Already we see arbitration committees in large departments of business supplanting the courts, while in other quarters there are occasional outbreaks of violence, scandalous and criminal, liable to confound the innocent with the guilty, and menacing the very existence of social order. Society can not allow any of its members to take the law into his own hands, or try to right himself by violence. Whenever it does so, it abdicates a part of its functions, and in the end must give way to anarchy.

If at the formation of a government it were asked how soon shall redress be made to follow an infraction of the laws, the answer would be, so soon as the facts can be made known to the officers of the law. How near we have come to this ideal will appear hereafter.

The resolution of the Association presents three questions:

I. What is the extent of the delay and uncertainty existing?



II. What are the causes?

III. What are the remedies?

The better to answer the first, we sought information from members of the Association in the different States; for an answer to the second we had only to follow the processes of a lawsuit, as generally conducted; and in answer to the third we venture the recommendations hereinafter made, to which the information received and our own reflections naturally led. We assumed that the extent of the delay might best be measured by the period between the beginning and the end of a lawsuit, and the uncertainty by the number of reversals on appeal, and upon that idea we addressed a series of questions to one or more members of the Association in each of the thirty-eight States of the Union. The answers contain a body of useful information and suggestion of which we have been prompt to avail ourselves. A copy of the questions and a summary of the answers are annexed to this report.

#### EXTENT OF THE DELAY AND UNCERTAINTY.

It appears that the average length of a lawsuit varies very much in the different States, the greatest being about six years and the least a year and a half. The uncertainty varies also, the greatest average number of reversals in a single year being forty-eight out of seventy-three appeals, and the least forty-four reversals out of two hundred and forty-four appeals. In one of the States, from a series of Supreme Court reports, twenty-five volumes, taken at random, have 1,180 affirmances and 1,160 reversals. Nearly all the answers agree that the delay and uncertainty can be lessened, though they differ as to the means. Some advise one remedy and some another. Our own views will be given hereafter.

The business in the two most important courts of the country, the Supreme Court of the United States and the Court of Appeals of New York, is well known. That of the former during its last October term—that is, from October, 1884, to May, 1885—was as follows: The number of cases on the docket at the close of October term, 1883, was 845; the number docketed during October term, 1884, 470; total 1,315; number of cases disposed of at the term closed in May, 1885,

464; number of cases remaining undisposed of, 851; total, 1,315; number of cases continued under advisement from October term, 1883, 10; number of cases argued orally, 196; number of cases submitted, 119; number of cases continued, 16; number of cases passed, 8; total, 349; number of cases affirmed, 199; reversed, 97; dismissed, 39; docketed and dismissed, 27; questions answered, 2; settled and dismissed by the parties, 85; dismissed in vacation (under the twenty-eighth rule), 15; total, 464. The number of opinions delivered was 272. Judging by the past, it is estimated that the docket at the end of the next term will contain 1,300 cases.

The business of the Court of Appeals of New York was as follows: The number of appeals on the calendar at the beginning of 1885 was 782; when the court adjourned, at the end of June, for the summer vacation, the number was 873. During 1884, 487 decisions were rendered, including appeals from orders entitled to be heard as motions. Some of these decisions disposed of more than the particular case; one, for instance, disposed of thirteen cases then on the calendar. In addition to the 487 decisions just mentioned, there were 92 on motions called non-enumerated. The whole number of decisions during 1884 appears thus to have been 505, leaving a calendar constantly increasing. The number of appeals in 1884—that is, of returns filed in that year—was 670; the number in the first half of 1885 has been 353.

In respect of delays in the other courts of the country, it is difficult to obtain statistics sufficiently comprehensive and at the same time sufficiently minute to form the basis of an exact report. In the city of New York we have, however, the means of ascertaining with considerable exactness the number of cases brought into the courts and the number decided within a definite period. It is to be regretted that it is not made the duty of some public officer in every State to furnish the statistics of litigation. The laws provide for statistics of many branches of business and many transactions of government; and it is remarkable that provision has not been made for the operations of that department of the government which most affects the security and well-being of the people. In the city of New York, as has been said, we are able to give de-

tails of judicial administration, from which some lessons at least may be drawn for the whole country.

There is in this city a Supreme Court of general jurisdiction throughout the State, with seven judges ; a Superior Court of general jurisdiction within the city, with six judges ; a Court of Common Pleas having also general jurisdiction within the city, and six judges ; there is a City Court having jurisdiction of civil actions for money demands to \$2,000 ; eleven district courts with jurisdiction of money demands to \$250 ; and one surrogate, besides three judges of the Court of Sessions and eleven police justices—the last fourteen being exclusively occupied with criminal business—making fifty-one judges in all for a population of a million and a half on Manhattan Island. The business waiting and the business done in these civil courts is reported as follows : On the Supreme Court special term calendars from the 1st of October, 1883, to the end of June, 1885, there were placed 1,295 issues of fact and 273 demurrers, the oldest issue being 1st February, 1873, and the latest 16th June, 1885 ; 612 of these issues and 162 demurrers were tried, dismissed, or submitted. Every case was called in its order, and, if ready, tried. On the jury (circuit) calendars from the 1st October, 1883, to the end of June, 1885, there were placed 4,518 causes, excluding 228 run down on the first call, and added to the calendar a second time with new numbers. The oldest issue was dated 18th January, 1860, and the latest 22d June, 1885. Of all these causes, 742 only were tried, while 1,123 were dismissed, referred, discontinued, settled, or abated. All the causes on these jury calendars were called down to and including 4,003.

From the 1st of October, 1883, to the end of June, 1885, the courts were in session eighteen months, of twenty days for each month, making 360 court days in two years, during which time five causes were daily disposed of, on the average, in the several jury terms, and two causes daily, on the average, in the special terms.

The business done at the chambers, during this period, resulted in the making of more than 30,000 orders after hearing argument.

In the Superior Court during 1884, the general term dis-



posed of 192 appeals, the special term tried 249 causes, the jury terms, 689. There are now 1,746 cases awaiting trial, of which 86 are at the special term and 1,660 at the jury terms. There are no arrears at the general term. The orders made at chambers numbered 11,983.

In the Common Pleas, during 1884, 372 appeals out of a calendar of 577 cases were decided at the general term, including 179 appeals from the district courts; 36 cases out of a calendar of 131 were tried at the special term; 229 were tried at the jury terms between October, 1883, and June, 1885, out of a calendar of 1,892 cases; 17,870 orders were made at chambers.

In the City Court, 2,257 cases were placed on the calendar, between July, 1884, and July, 1885, of which 1,608 were tried or otherwise disposed of. It takes five months to reach a case in its regular order.

In the eleven district courts 12,170 civil actions for damages were tried in 1884, and 33,924 cases of defaulting tenants and of corporation penalties were disposed of. There are no delays. A case is generally tried in two weeks from its commencement. There were only 179 appeals to the Common Pleas, and of these not more than three were taken to the Court of Appeals. In less than three per cent of the cases was a jury demanded.

In respect of uncertainty we can easily find the number of reversals in each State. We content ourselves with four States. An examination of the last volume of Reports of Decisions in the courts of last resort of New York, Pennsylvania, Ohio, and Virginia, respectively, four States which may be considered representative and which have courts of appeal separate from the courts of first instance, gives the following results: Volume 97 of the Reports of the New York Court of Appeals, contains 79 decisions, of which 38 were reversals. The judges cited in their opinion 449 decisions, being 353 made in New York, 56 in England, Scotland, and Ireland, 8 in our Federal courts, 7 in Massachusetts, 4 in Pennsylvania, 3 in Vermont, 2 in Connecticut, 2 in New Hampshire, 2 in California, 2 in Minnesota, 2 in Alabama, and in New Jersey, North Carolina, Kentucky, Florida, Virginia, Indiana, Maine,



and Iowa, 1 each. Volume 105 of the Pennsylvania Supreme Court Reports contains 95 decisions, of which 44 were reversals. The citations of the judges were 451. Volume 39 of the Ohio Supreme Court Reports contains 98 decisions, of which 46 were reversals. The citations were many. Volume 78 of the Virginia Supreme Court Reports contains 81 decisions, of which 40 were reversals. The citations were 576. The sources of these citations made by the judges of Pennsylvania, Ohio, and Virginia, in their opinions, were as various as those made by the judges of New York.

These were the decisions cited, examined, and commented on by the *judges* in making up their own opinions. But the decisions cited by *counsel* and pressed upon the judges for their consideration were, it is safe to say, ten times as many. In volume 88 of the New York Reports, the number of cases cited by counsel was 5,037. A single case reported in volume 97 shows that the counsel on the two sides cited 285 decisions, of which 125 had been made in New York, 61 in England, 2 in Ireland, 4 in Pennsylvania, 4 in North Carolina, 4 in Massachusetts, 2 in New Hampshire, 2 in New Jersey, 2 in Kentucky, 2 in the Federal Reports, and from Maine, Vermont, Iowa, and South Carolina, 1 each.

Some of the appeals were from courts which were themselves courts of appeal from lower courts. Thus the cases in the New York Court of Appeals were reviews of judgments and orders in the general terms of the Supreme Court and the Superior Courts of cities, rendered on appeals in each from a single judge of the same court. Volume 42 of the New York Supreme Court Reports contains 130 cases reported in full, 14 "memoranda of cases not reported in full," and 317 "decisions in cases not reported." Of the first two classes, 82 were reversals, that is to say, 82 out of 144; more than half. Of the last class 69 were reversals, that is, more than one in five; and of all the 461 cases decided, 96 were reversals. The first page of the volume mentions 14 cases, reported in eight volumes of Hun's Reports (25 to 32) as having been taken by appeal to the Court of Appeals, of which 5 were reversals and one a modification of the decision below. This volume, 42, contains a list of 1,120 decisions cited by the

court; whether cited in making the decisions not reported does not appear, but probably they were the citations in the cases reported fully or partly. In that view, if an average could be made, each of the 144 decisions rested on about 8 previous decisions. Now, it is probable that of the decisions in cases not thought worth reporting, few if any, went to the Court of Appeals. Taking that for granted, it shows, that the defeated parties acquiesced in the 69 reversals. Of the other cases it would require an actual count to show how many of them were reviewed by the Court of Appeals.

#### THE CAUSES OF THE DELAY AND UNCERTAINTY.

The best method of ascertaining the cause of DELAY is, as we have said, to follow the usual processes, and to discuss them as we go along. The first natural step is a complaint of the party aggrieved. By the common law this step was full of danger; it was necessary to choose first between two highways, one called legal and the other equitable, and on turning into the former it was found divided into several lesser ways or by-ways, called forms of action. The suitor was obliged to choose one among them all, at the hazard of irretrievable defeat. This was the rule of the common law, and is still the rule of about half the States of the Union. The other method, that which the other half of the States and all the Territories but one now pursue, is to have one highway only, or, to drop the figure, one form of action, in which the facts are to be set forth as they are or are supposed to be, and such relief sought as those facts may warrant. Between these two methods we see no room for doubt as to the choice. The methods of the common law were unwise and injurious. They were unphilosophical; they had no significance except as marks of a school of dialectics, now in all else forgotten, and they exposed the suitor to unnecessary entanglement in a maze of forms, over and above the hazard of the law and the evidence; the hazard of doubtful law conjectured out of irreconcilable precedents, and of disputed facts extracted from contradictory evidence.

A lawsuit is a contention before the judges of the land respecting an alleged infraction of law. Whether the com-

plaint be made by the State or by the citizen, whether the demand be for the prevention or redress of a private wrong or the punishment of a public one, the ground of the complaint always is, that the defendant has violated, or is about to violate, a legal precept. Two fundamental questions are thus raised: What is the fact and what is the law? To the answering of these two questions all others tend, and as they are answered surely, easily, and speedily, or otherwise, the success or failure of judicial administration is determined.

The theory of a lawsuit is, therefore, to hear what the parties have to say, and to decide between them. In doing this the simplest and most direct method is the best. The plaintiff must make his statement—that is the first step; the defendant must make his answer or be held to admit the truth of the complaint—that is the second; if they differ, the truth of the fact must be ascertained—that is the third; and then the law must be applied, which is the fourth step and the last if there be no appeal. These several steps may be shorter or longer. A short one is the best if it be a sure one. Some side steps may have to be taken, according to the circumstances of particular cases. But, in all, not a single unnecessary step should be required or allowed. In other words, no form or proceeding should be permitted which is not necessary to ascertain or preserve the rights of the parties, no form or proceeding that can not be understood by either party, none that causes needless delay or needless expense. There must, however, be a complaint, and if there be an answer there must be a trial of the fact, a judgment on the law, and an execution of the judgment, with occasional incidental proceedings, such as orders made in the progress of the cause to insure the efficiency of the judgment. In other words, there may be in civil actions these several processes—the complaint, the answer, possibly a reply, the provisional remedies of arrest, replevin, injunction, attachment, receiver, or deposit, a trial of the facts in issue, the judgment on the law, the execution of the judgment and one or more appeals, twelve or fourteen distinct processes, most of which are or may become necessary in a severely contested lawsuit. The problem is how to expedite them all, preserving at the same time every



right of the parties, and to cut off, with an unsparing hand, whatever is not necessary to this design.

Before discussing the regular and essential processes, let us discuss briefly the incidental ones, and say here, once for all, what we have to say about them. The first observation is, that they should never be allowed to retard the progress of the main contention. Whatever motions may have to be made respecting an arrest, an injunction, or any other of the provisional remedies, they can be made without postponing the issue, the trial, or the judgment. The practice of converting the incidental into the principal is not to be commended; on the contrary, it is to be strongly condemned. The practice, however, grows apace. Actions are brought, not with a view to the final trial and judgment, but with the view of gaining a temporary advantage, which may, from the sheer pressure of inconvenience and delay upon an adversary, force him to yield, through the operation of an arrest, or an injunction or a receiver. This is a dangerous proceeding. The motions are heard on one-sided affidavits, evidence of the loosest and most dangerous kind. The abuse of injunctions especially has grown to be a serious grievance. We have no hesitation in recommending that they should never be granted, except on positive evidence, after adequate security given to cover all possible injury from their operation, with an opportunity afforded of hearing both sides without delay, and the positive requirement of a decision within a fixed and short period. We do not think injustice would be done if a decision within a week were required. In the courts of the United States a restraining order can not be made, unless "there appears to be danger of irreparable injury from delay."

Returning now to the regular processes of a lawsuit, we must remember that one of the parties at least is generally not averse to delay. It often happens, more often than otherwise, we fear, that one of them is very desirous of delay and strives for it; so that, when we are considering how the several steps in a suit can be shortened, we must consider how they can be shortened against the will of one of the parties; for, if both parties really desire a speedy decision, they can materially shorten every step and hasten every movement.



Before proceeding to consider these questions, however, let us observe that all lawsuits are not necessarily or properly to be treated in the same way. That, indeed, was the old plan of the English common law. A claim on a note of hand was treated like a claim to an estate. The parties came into court in the same solemn manner, the written pleadings were of the same formality, the trial was by the same machinery, the decision and the enforcement of it brought about by the same methods. Here, we think, was a mistake. When the parties have themselves stipulated in writing for the payment of a given sum of money, or the delivery of a specific thing, or the performance of any other specific act at a specified time, the process in dealing with a dispute between them should be summary. They have stipulated for a certain thing to be done at a certain time, and except in very exceptional cases should be held to a prompt disposition of their respective pretensions. This has been done in the State of New York by a special statute, under which a tenant who fails to pay the stipulated rent at the stipulated time may be made to surrender possession to his landlord, leaving all other questions between them to be settled afterward. And in England it has been provided by statute that, upon a promissory note or other negotiable instrument, the holder may have summary judgment, unless the defendant shows upon oath reasonable grounds of defense. We think, therefore, that a distinction should be made between different classes of claims, and, while most of them may be left to the ordinary processes, some should be subjected to those which are summary. The reason for the distinction lies in this, that in the latter class of cases the parties have agreed upon everything, or nearly everything, which the courts could have done for them, and have left little to be disputed. And, furthermore, the exigencies of commerce will not admit of the delay which other claims may suffer, without the same loss or inconvenience.

Confining ourselves for the present, however, to the delays in an ordinary lawsuit, how are they to be dealt with? Opportunity to answer the charge must be given to every person charged with an infraction of law. Such an opportunity involves some delay. It is an inconvenience inseparable from

human administration. Slow justice is better than swift injustice. Do your work as quickly as you can, but do it well, is the law's commandment to all its judges. And as to certainty—that is to say, absolute certainty—it can not be affirmed of anything dependent on human judgment. The most that a judge can declare is this; I infer from the evidence such to be the fact, and I find in the law-books such to be the law. It is only omniscience and omnipotence that can in an instant discern the fact and administer the law. All that can be expected of any system of judicial administration among men is that it shall make the nearest approach that man can make to the unerring judgment of an infallible mind.

Beginning with the first step of the complaining party, his complaint, it should be as simple as possible. Its only office is to apprise the other party of what is charged and demanded, confine the action of the court to the charge, and to make the record. The next step is the answer. How much time is it reasonable that a defendant should have for answering a charge? And preliminary to that question is another, that is, where is the answer to be made? for, if it must be made in open court, the parties will have to wait for its sitting. But if the answer may be delivered in writing at any time, either by filing it with the clerk or giving it to the party, such a time should be fixed as will, on an average, answer the needs of a defendant, so that there shall be as little occasion as possible for an application to enlarge it. Ten days will answer in most cases; twenty days should answer in all but the most exceptional ones. Oral pleadings are not suited to the habits of our people. The time of the suitor has become too much occupied. Written pleadings, rightly conducted, are, in fact, labor-saving processes. Convenience, as well as certainty, requires that both complaint and answer should be formulated and reduced to writing.

The charge and defense being developed, the State is to intervene and dispose of the controversy. Whatever of delay now occurs is the fault partly of the State and its officers and partly of the contestants. The State has an interest in bringing the contention to an end as speedily as possible for the sake of peace, if there were no other reason. But there are

other reasons. The mere presence on the record of an undecided case tends in some degree to interfere with the disposition of the other cases, for it stands in the way, and acts as a menace of intrusion into the order of business. Therefore, whenever the court is ready, and the parties without sufficient excuse are not ready, the case should be dismissed from the court.

Supposing, however, both the parties to be ready, the State should be ready also. This is a duty which the body politic owes to all suitors—a duty which, however neglected, is none the less imperative and of universal application. The State should never keep the citizen waiting for justice longer than is necessary to bring the judges to their seats. There are two maxims, a strict adherence to which would go far to wipe away the reproach of the law's delay: one that the State should be ready for the trial when both the parties are ready; and the other, that if both are not ready when one of them is, the unready one should be put in default, unless he offers an excuse satisfactory to the court, and conformable to previously defined rules. Make the rules for these excuses precise and inexorable. The parties can, of course, waive them if they choose; but, if insisted upon by either, the court should not be permitted to dispense with them any more than it is permitted to dispense with the period of limitation for an action or an appeal. One of the rules should declare that the absence or engagement of counsel elsewhere is not to be accepted as an excuse. To allow it would be to impose a sacrifice which neither the counsel nor the party in the one suit has a right to expect of either counsel or party in the other. And, moreover, the interests of the public are opposed to it. Neither should the convenience of a party be an excuse. It is especially his business to be in court, when his adversary is there to confront him. No more should the absence of a witness, unless it be shown that the party offering it has done everything that could be reasonably expected of him to prevent the absence. These may all be rules now, in some courts and places, but they are generally enforced with laxity, if enforced at all.

Suppose the trial once begun, how can it best be brought



to an end? By trying the issue as rapidly as may be with safety, and so trying it that the process shall not have to be repeated. Observe the process as it is now presented. No sooner is the trial opened than a wordy debate begins. Question after question is objected to; the objection is discussed for and against; the law reports are brought in and read, that it may be seen what some judge, learned or unlearned, in the same State or some other State, has said on some question, more or less like the present, and all this with the certainty that, if on one or more appeals other judges think that the question has been improperly admitted or improperly rejected, the whole trial goes for naught, and a new one has to be fought over, with perhaps the same experience and the same results. The wonder is, not that so many trials fail, but that any one ever gets through aright. It follows, as might have been expected, that we so often find practical failure in the search for theoretical perfection. It might be well, possibly, if there were time for it, that every question should be discussed until nothing more could be said on either side, but if that were to be done, no patience could survive the trial. The habits now prevailing and growing worse every day must be changed; the wearisome questioning of witnesses must be curtailed; the interminable debates must be stopped; appellate judges must consider more often, not whether a question was theoretically right, but whether its reception or rejection was practically injurious; and especially when a jury is in the box, the court must look to their convenience and spare their time. In short, a radical reform in the methods of trial courts must be somehow wrought out.

This picture of a jury trial, though by no means imaginary, may not answer for all parts of the country, but there is so much similarity that we may safely reason from this specimen. We know that a great deal of time is misspent. First, the unpunctuality of the judge, if unpunctuality there be, as does often happen, is a serious grievance. He has no right to trifle with the time of lawyers, suitors, and witnesses; and even though he may have perhaps the excuse that he has been detained by judicial duty at chambers, he should remember that one of the first duties of a public officer, especially



a judicial one, is so to arrange his engagements that one shall not clash with another, and the public thence be put to inconvenience.

Let us take our seats as spectators of a severely contested jury trial in a court of general jurisdiction of one of our cities, say in the city of New York, and see how one of them at least is conducted. The hour of the sitting is fixed for eleven o'clock. At that hour a crowd of lawyers, suitors, witnesses, and spectators is in attendance ready for the judge. He comes, perhaps punctually, and perhaps not punctually, but after a few minutes, or a quarter of an hour, or half an hour, nobody can foretell which.

At last he appears, and begins by asking what suits are ready, or rather by calling over the calendar, an unintended but real invitation to the parties, one or both of them, not to be ready. This call, and the little debates which follow, take perhaps another half-hour; so that the spectators may think themselves fortunate if they see a suit begun as early as twelve o'clock. It is then brought on, and the names of the attending jurymen are called as they are drawn one by one from the wheel. Some questioning generally follows; now and then a contest and a side trial over one or more of the names drawn; but at last a jury is completed. Then the case is opened by the plaintiff, and the examination of witnesses begins. When three or four questions have been put and answered, some objection is made; it is duly debated for a few minutes, or it may be for an hour, or even for hours; the judge decides, the question being allowed or disallowed; an exception is noted, and the questioning starts again. In a short time, however, comes another objection, when the process of debate, decision, and exception is repeated, and so on until, perhaps, the day is spent before the first witness is dismissed, and an adjournment to the next day is taken. The next day comes and goes, with the like experience, and so another, and yet another, until at last, the testimony being finished, a discussion is opened upon one or more requests to the judge for his charge to the jury; then follows the charge, the exceptions to the charge come after, and finally the verdict, with perhaps fifty or a hundred exceptions on the record.

The trial being ended, a re-examination of all the legal questions that arose can generally be had if either party desires it, and one or the other will desire it, if he thinks he can derive advantage from it. The method of re-examination differs in different States; in some the questions are carried directly to another court; in other States they are re-examined in the same court by other judges or possibly by the same judge. The success of whatever method depends upon the ability of the judges; of the trial judge in the first place, and the re-examining judges in the second. An incompetent judge is an expensive officer. It were better for the State if all the incompetent aspirants for judgeships, who beset nominating conventions or executive chambers, were provided for at the public expense in some other way, than that they should be seated upon the bench to harass and bewilder suffering counsel and more suffering suitors.

Whatever may be said in other respects of the institution of the jury for civil cases, it can not be denied that it is the cause of great delays. This is the effect principally of two causes, one of which is the requirement of unanimity. When the jury is discharged, by reason of disagreement, the case has to be retried. Another and much more considerable cause of delay in the final result is the ordering of a new trial for a misdirection of the court, or an erroneous admission or rejection of evidence. This may be obviated to a great extent by requiring the verdict to be special, upon questions submitted by the judge. The result would be that an error of the judge upon the trial would not require a new trial, unless the error related to a finding essential to the judgment; that is, one without which the judgment could not have been rendered. We shall recur to this subject.

Costs, too, have something to do with the delays. Two theories are propounded respecting them: one, that they should be made sufficient to cover all the expenses of the successful litigant; the other, that they should cover only the fees of the court officers, such as clerks and sheriffs. On one side it is argued that a party who has put his adversary to needless expense, and suffered defeat in the suit, ought justly to indemnify this adversary; on the other side it is argued

that no system of costs will prevent an unjust claim or an unjust defense, and that in most instances they are instruments of oppression rather than of justice, and if they are made to depend at all upon the discretion of the judge the discretion is dangerous. The choice between the two depends more on experience than on theory. And we think experience has shown that to allow no costs, except the fees of the officers, is better than to attempt an indemnification for the expenses of the prevailing party.

It appears to us that a great deal of time is wasted and no little uncertainty introduced into the law by the habit of delivering long opinions at the time of pronouncing judgment. Any one who will look into the decisions of Lord Mansfield will perceive the difference between the old habit and the new, much to the disparagement of the latter. Our volumes of reports have too many dissertations in the shape of opinions. The inconvenience thence arising is manifold: the time of the judges is wasted; the reports and the cost of the reports are grievously swollen; and, worst of all, there is the chance, with reverence be it spoken, that some of the dissertations, if their expansion goes on, may be delivered in clouds of verbosity, covering as with a fog the points to sight and steer by.

We think, moreover, that giving by statute a preference to certain cases on the calendar is a mistake. The courts may well be trusted for the regulation of their own calendars; and when they find a case to be of such public importance as to require a hearing before all others, they will be quite sure so to hear it. Whenever the State enacts that one case shall be heard before another, which stands ahead of it in order, it confesses its own negligence or inability to provide a prompt hearing for all.

The preparation of the record for re-examination is often made a serious affair, and takes no inconsiderable time. Why it should is not apparent. All that is needed is a transcript of such part of the record as is necessary for re-examination.

The question of appeal is always a serious one. How many successive appeals should be allowed, and within what time should they be taken? The answer to the first depends upon the organization of the courts. In the State of New York,



for instance, where there are upward of seventy co-ordinate trial courts of the highest original jurisdiction, it would be out of the question to give an appeal from each of them to the Court of Appeals; there must, of necessity, be a previous sifting of the case by a proceeding in the nature of an appeal in the original court itself; that is, an appeal from one judge to two or three co-ordinate judges. In other States the same reasoning may not apply, and one appeal may suffice. The time allowed for an appeal should be short. It is now in many instances long, grievously long indeed—a year, two years, sometimes six or seven.

The formality of appealing should be as simple as possible; nothing should be required but a notice that a party does appeal, a transmission to the appellate court of a copy of the record and security to abide the judgment, unless the suggestion hereafter made shall be adopted, requiring a brief of the objections to the judgment appealed against to be filed with the notice of appeal. The problem is how to facilitate the hearing and decision when the record has reached the higher court. To solve it, we must compare the work to be done with the workmen who are to do it; in other words, measure the workmen with the work. We must have skilled workmen, no doubt of that, or the work can not be done; that is, it can not be done to answer the purpose of the work, which is the same thing as saying that it can not be done at all. We know how many hours there are in a day, and how many of these hours a man with a sound mind in a sound body can devote to work. We must put upon him, therefore, no more than he can do, for then the work will not be done. It is true that one man's rights are as sacred as another's; but it does not thence follow that a little case should go to the highest court if a great one does. We have courts for small causes, and nobody is foolish enough to think that the costly machinery of the higher courts should be used for them. We make as many courts of appeal as the people of each community think expedient; some more, some less. Nobody dreams that we should go on multiplying appellate courts so long as any suitor wishes to try his hand again. There must be a limit to litigation, and that may be reached by limiting the



causes that are to go to the courts of appeal, or increasing the judicial force which is to take hold of them, and put an end to them.

The Supreme Court of the United States can hear and decide four hundred cases in a year and no more. It is folly, then, it is grossly unjust, to send to it more than that number of cases. Where, it may be asked, shall the line be drawn? That depends upon the ability of the judges for the time being to hear and decide promptly. It was drawn through one point a century ago, it may be drawn through another to-day and through another a quarter of a century hence, according to the number of cases in the lower courts. When the government was founded, appeals were allowed according to the supposed needs of suitors of that day; but the hundred years since have so increased litigation that the privilege of appeal must be more restricted than it was and is. There may be and there should be as many intermediate appellate courts as the interests of suitors require. Certain cases there are in which the Supreme Court has, by the Constitution, original jurisdiction, and therefore the appellate jurisdiction must be so limited as not to embrace, counting in the original cases, more than four hundred in all. In selecting these, the interpretation of the Federal Constitution and laws should be the chief object. Not a single question of fact should go up in any case whatever. And what is here said of the supreme Federal court applies with equal force to the highest appellate courts of the States. It may be well also to observe here that the labors of all appellate judges would be much relieved if a brief statement of the objections to the judgment were required to be filed with the clerk at the time of appeal.

The foregoing observations respecting the Supreme Court of the United States lead us naturally to the other Federal courts. The delay there is often greater than in the State courts. Federal legislation has tended latterly toward enlarging the jurisdiction and increasing the labor of the Federal judges. Whether this be wise or unwise it is not within the province of this report to discuss. But it is appropriate to the discussion to say that, in our judgment, the practice in the Federal courts within a State should be made to conform to

that of the State courts, for the reason that the people and the profession should be saved the time and the trouble of studying and practicing two systems. The act of Congress of June, 1872, requires this conformity in respect of legal actions, but leaves the equitable ones to be governed by the rules framed by the Supreme Court judges. We think that the practice in the latter class of cases should be conformed so far as it may constitutionally be done to that of the State courts, in respect of equitable as well as legal actions; and, furthermore, that whenever in any State the two classes are merged in one they should be merged in the same way in the Federal courts. It has been suggested, and with much force, that there should be a code of procedure, civil and criminal, enacted by Congress for all the Federal courts in all the States. If there were reason to expect that the adoption of such a code, simple and direct, without unnecessary details, would lead to the adoption of one like it in the States, we should think it very desirable. But until then we think that the entire conformity of Federal to State procedure in all actions is greatly to be desired. In respect of substantive law, we think also that the act of Congress, which provided so long ago as 1789 that the laws of the several States should be rules of decision in trials at common law in the Federal courts should be made applicable to all trials and to embrace all law not purely federal.

The statistics of business in the Federal courts show that many of the districts are so greatly in arrear that there is a practical denial of justice. How these courts should be reconstituted we do not inquire, further than to call attention to the principles we have elsewhere discussed, and to add that we think an appeal should be provided against every judgment rendered by a single Federal judge to two or more judges holding an intermediate court.

We ought not to omit mention of the courts in the District of Columbia. They are specially important, because they have close relations with the administration of the Federal Government. It is enough, however, to say here that the judicial administration of the District violates almost every principle that we are now endeavoring to establish. The courts are

badly organized, their procedure is faulty, and the substantive law is uncertain and confused beyond that of any other community in the United States. Of twelve appeals from the highest court in the District, decided by the Supreme Court of the United States during the last term, seven resulted in reversals, four in affirmances, and one was dismissed.

We have so far considered only the proceedings in a lawsuit of a civil character, and have paid no attention to criminal proceedings. They scarcely need special mention. The principles discussed as applicable to civil suits will apply generally to criminal ones. One measure, however, we recommend, and that is the appointment of a public defender wherever there is a public prosecutor. The innocent are liable to suffer, and do often suffer, for want of proper advice and defense, especially when first arrested. It can hardly be disputed that, to prevent abuse of its own processes, the State should be a "helper of the helpless." Of course, the office should be so guarded as not to interfere with the right of the accused to choose his own defender if he will.

The UNCERTAINTY of judicial administration arises from one of three causes: the mistake of the judge as to law, or his mistake as to fact, or the uncertainty of the law itself. There may be no rule of law to fit the case, or there may be one and the judge ignorant of it. A mistake of fact there is no remedy for, except by procuring the best persons to decide, be they well-trained judges or intelligent jurors. A plaintiff often begins a lawsuit, or his adversary defends it, with prejudices derived from a one-sided view of the facts. Thus it often happens that a party does not know the whole case, because he sees only his side of it. It is when both sides are heard, and their evidence produced, that the whole case is known. This is not a fault but a benefit of the lawsuit, as it develops all the circumstances, and thus enables the judge, jury, and party to see the facts as they are. We need not, however, dwell on this cause of uncertainty. Our concern now is with the mistakes of law made by the judges, and the uncertainty of the law itself. Supposing the law to be certain and easily known, the mistakes of the judges are the mistakes of ignorance, for which there is no cure but in the sub-



stitution of capable for incapable judges. By so much as a complete judge is a blessing, by so much is an incompetent one a scourge. The one is learned, courteous, patient, firm, quick to discern and prompt to decide; the other is ignorant, rude, impatient, infirm of purpose, dull, and dilatory. Both may be honest in the sense of intending no wrong, but the difference between them is, that one is in his right place, and the other is out of his place altogether.

The only remaining element of certainty or uncertainty is the character of the law itself, as it is certain or uncertain. Now, the state of the law we pronounce to be one of the greatest uncertainty. Did we not see many men of fair learning and intelligence affirm the contrary, we should say that all men believed it and all men knew it. This uncertainty comes in a great degree from the nature of the sources whence the law is derived; it is made by the judiciary and not by the Legislature, made to fit particular cases, and not by general rules, and made always after the fact. It will not answer the objection to say that the Legislature makes bad laws sometimes. So does the judiciary. But the former need not make bad laws. If it be not able to make good ones for the future conduct of the citizen, leaving the judiciary to enforce them, still less is the judiciary able to make and enforce good laws for the past conduct of the citizen. We say a hundred times a day that we are governed by the common law. Where do we find this common law? The notion that it is found in usage or tradition we know in this young country to be untrue. Nothing here dwells in tradition, nothing in usage. The notion that common law is something floating in the atmosphere, visible only to the initiated, is one of those mythical phantasms which serve to amuse and deceive indolent credulity. Where, then, is this common law to be found? In the decisions of the judges, and there only. What judges? All the judges of the English-speaking peoples—American, English, Irish, Scotch, and the English provinces, all over the world—seventy or more distinct communities in all—with distinct judicial establishments. How many of these decisions are yearly made and reported? About sixteen thousand in this country alone. Are they announced in the form of legal propositions or pre-



cepts? By no means. They are the conclusions upon law and fact of legal controversies brought before different judges, in different forms, argued on each side by different counsel, and reported by different reporters. Is there any guarantee of the accuracy of these reports? None but this: that they are generally made by official reporters, who gather as they may the facts out of documents long or short, and masses of statement large or small, and follow them with opinions as they are written by the judges, which opinions are sometimes dissertations upon topics relevant or irrelevant according to the wisdom or unwisdom of the writer. Is this an imaginary picture? Let the facts stated in the beginning of this report answer.

We can imagine a primitive society, in which a king and his judges were the only magistrates. They had made no laws. The judges decided each controversy as it arose, and by degrees what had been once decided came to be followed, and so there grew up a system of precedents, by the aid of which succeeding cases were decided. Hence came judge-made law. But could any sane man suppose that this was a scheme of government to be kept up when Legislatures came in?

The difference between judge-made law and jurisprudence founded upon statutes is as wide as the poles. The true function of the Legislature is to make the law, the true function of the judge is to expound it. But, because language is at best an imperfect expression of intention, and sometimes susceptible of more than one interpretation, and the courts are now and then obliged to choose between different interpretations, it does not follow that the function of interpretation is to be enlarged into the function of legislation. The separation of the two is in theory assumed, and in constitutions declared, however the theory may be contradicted and the Constitution ignored in practice.

Jurisprudence is not the making of law, but the application of it; this application belongs to the courts. The Constitution of the United States was not made by the judges; they expounded it, and generally in the exposition other courts will follow the Supreme Court: but the Supreme Court has

not always followed itself—that is to say, it does not always adhere to its own precedents; the executive and legislative departments do not feel bound to follow it; nobody, in any department or court, would now follow the *Dred Scott* case, and there are many who would not follow the late legal-tender exposition of the Constitution.

Jurisprudence is not retroactive. The statute is there; everybody may read it for himself; if he thinks it means something different from what the courts think, he takes the risk of that; such a risk is inseparable from the use of language. In construing the meaning of a statute, the courts in no sense make the law; they only interpret.

Law libraries hold two classes of books, one large and one small; the latter contains the statutes. In the oldest of the States, the statute-books may number over a hundred. In New York there are 125. How many other law-books are there? From ten to fifty thousand. The law not contained in the statutes was made by the judges. For this reason it is called judge-made law; sometimes it is also called case-law, and sometimes the law of precedents. The last is the best name for it.

It may be asked, Can judge-made law be eliminated from our legal system altogether, as if the answer could affect the question of codification? It could not, indeed, affect it, because partial elimination may be better than none at all. But it is quite possible to eliminate judge-made law from our system; that is to say, every general rule of the law can be reduced to a statutory form; not all at once perhaps, but by degrees—that is, a great part now, the rest hereafter. Under such a code precedent ceases to be law, and becomes a guide. Exposition is not in any just sense judge-made law; in fact, it is not law at all. If in the process of exposition the inferior court follows the superior, it yields to authority; if one co-ordinate court follows another, it defers to another's judgment in cases where opinions may differ; if, however, the previous judgment is clearly in conflict with the enactment, the former must give way, for the reason that the enactment is the paramount authority.

Two questions are sometimes asked in respect of a code:

I. How will the judges decide, if they find no provision of the code to guide them ; and,

II. How will they decide if they find no provision of the code, and no precedent ?

The answer to each is easy :

I. If they find no statutory provision and a precedent, they will decide according to the precedent.

II. If they find no statute and no precedent, they will decide, as they would now decide in the same circumstances, that is, upon the nearest analogy to an established rule, or according to the dictates of natural justice ; or, they may possibly leave the case undecided, as Lord Mansfield did in *King against Hay*.

There is still another question : Will not one court, in construing a provision of the code, follow a construction already given by another ? In other words, will not the courts thus make a law unto themselves by adhering to the principle of following adjudged cases ? The answer has been already given, and we will add that, so fast as concurring precedents accumulate in sufficient numbers, the Legislature may add more provisions to the code ; so that in fact the code will keep expanding, as the people and their business expand. We shall meantime have gained this inestimable advantage : The rules already accepted will for the time being be collected, classified, and arranged, inconsistencies will be reconciled, bad precedents will be discarded, good ones established, and, above all, the people will be able to see the law for themselves. We shall have firm ground somewhere ; whereas now the law of precedents is not and can not be known generally by the people ; nor can it be known with certainty by even the lawyers and the judges, to say nothing of the time wasted in searching innumerable precedents.

A single word expresses the present condition of the law—chaos. Every lawsuit is an adventure, more or less, into this chaos. An anecdote has been told by a newly appointed judge, of his first appearance in the consultation-chamber of a court of appeal. The several judges expressed their views, one after another, while one of them walked up and down the chamber, and at length, stopping before the new-comer, asked



him what he thought of the machine; the questioner heard the answer, and replied, "I thought when I came that here the law was known, but I found that it was only guessed at." What does this anecdote signify? The judges between whom the little conversation occurred were two of the ablest and purest in the State. They had the common law in all its amplitude with its accumulations of a thousand years. If they had, nevertheless, to guess at it, is it not high time to try something else? On another occasion, in the same court, an earnest debate over a decision occurred between two judges, one of whom said to the other, "I tell you this is the law," and the other replied, "It may be the law now, but it will not be the law after this case is decided."

It is idle to think of going on as we are going. The confusion grows worse all the time. Chaos deepens and thickens daily. If one would see how it works, he has but to look into the case of the Bank of the Republic against the Brooklyn City and Newtown Railroad Company, in the one hundred and second volume of the United States Reports, where he will get a glimpse of the chaos, and find also an invitation to the judges of New York to change their law, as if they were the Legislature of the State. "The glorious uncertainty of the law" has become too serious for a proverb. What is the remedy? Nothing more or less than a recurrence to first principles and to have our law made by the Legislature, and not by the judiciary. The function of legislation and of interpretation can not longer be intrusted to the same hands. The law must be reduced to a statutory form. What do we mean by this? Not that every future occurrence can be foreseen and provided for. Not that language can always be made so precise that different interpretations may be impossible. But we mean that the general rules of law, upon given subjects, may be so stated in a statute or statutes as to be guides for the citizen, the lawyer, and the judge. We are apt to be imposed upon by names, and some of us seem to be in love with the imposture. Call a code a statute and half the objections made to it disappear, simply because we are used to statutes and not to codes. And yet a code is nothing but a statute; a comprehensive statute it may be, but not an ex-



clusive one. We all believe in statutes, for we have established constitutions in order to get them enacted; we elect Legislatures every year to enact them, and we publish every year volumes containing them.

Where must we stop? Shall we be told, thus far you shall go, but no further; you shall not venture into the domain which the judges have appropriated to themselves; you shall not declare by statute the laws of real property; you shall not declare the laws of personal property, nor the laws of personal relations, nor the laws of corporations, nor those of contracts and other obligations; the laws of sales, exchanges, partnerships, insurances, and negotiable instruments; you shall not tell the holders of public or private securities what rights they have or what duties they assume? Yet these are the very subjects which the people should be informed of, and for which Legislatures are created. The only questions which an intelligent person can ask himself about any proposed body of laws on these subjects are these: Does it state new rules or old ones, or both; if old, are they true; if new, are they right?

The advantage of reducing to a statutory form the rules of law so far as possible is obvious. The citizen should have them for his own instruction and guidance, the lawyer should have them for his study, the judge should have them for his judgment. We all believe that an indictment in a criminal action, and a complaint in a civil action, are indispensable to the protection of the citizen. If the charge, be it criminal or civil, should be formulated, is there not greater reason that the rules of law on which the charge is founded, should be formulated also?

We have another motive for present action. Every civilized country in the world has a code or is tending toward it. Great Britain alone, of all European states, is now without it, but even that composite kingdom is moving toward it with steps never halting, though irregular and fitful. It was but the other day that the London Chamber of Commerce presented a memorial to the Chancellor of England for a code of commercial law. The example of Europe has spread into Asia. Japan has a code already, fashioned after the French

model. \* China is about to pursue the same policy. Shall we, who have a government of the people, by the people, and for the people, alone of all the world, reverse the natural order of things, and leave the body of our laws to be made by a class?

There is another circumstance of lesser importance, but yet not wholly to be overlooked, and that is the admixture in English law of phrases, names, and illustrations, monarchical, feudal, insular, or Norman, peculiar to the situation and history of England, but unnecessary and unsuitable to be transplanted to these shores. They will readily occur to lawyers. The expressions "within the realm," and "the four seas," the definition of "navigable waters," and the illustration of a "base fee," are some of the examples. "Cestui qui trust," "baron and feme," "feme covert," "pur autre vie," "semble," would not now be endurable, except by those whose life-work it has been to "scrawl strange words with a barbarous pen." Blackstone illustrates a base fee as one that would be created by a "grant to A and his heirs, *tenants of the manor of Dale.*" Kent has it, "to a man and his heirs, *tenants of the manor of Dale.*" And very likely the expression has gone on in regular descent from commentator to commentator, to the present year of grace. These are more than mere matters of taste; they mark the servility with which we copy from over the sea. Is it not time to set up for ourselves?

A restatement of the objections to the making of law by the judges may be given as follows:

I. It is not their function. In fact, it violates the first principles of free government, which is the separation of its functions into three departments—legislative, executive, and judicial.

II. The judges are unfitted to the making of law as they make it; not from unfitness in the judges themselves, but because they do not meet, consult, and agree together about the law to be made.

III. The law made by the judges is not only fragmentary, but retroactive, made for the act after the act is done, and at the expense of the suitor, who, if he had known beforehand what the law was to be, might have conformed to it.

IV. The law made by the judges is made in part by per-

sons not belonging to the community over which it is to be enforced ; that is to say, the law which furnishes the rule for one state is made partly by the judges of other States and of foreign lands.

V. The law made by the judges is full of discordant elements ; so discordant, indeed, that the process of selection is a game of hazard, if it does not become a game of chance.

VI. The multiplication of law-books coming from the judge-law-makers has already increased beyond all endurance, and is increasing in a compound ratio.

VII. The law made by the judges is continually changing, and it is difficult to know beforehand what they will decide upon any given question.

Indeed, if it were possible to put into ten words the chief causes of the present delay and uncertainty in our judicial administration, they would be these: COMPLEX PROCEDURE, INADEQUATE JUDICIARY, PROCRASTINATION, RETRIALS, UNREASONABLE APPEALS, UNCERTAIN LAW.

Having thus presented an outline of the proceedings in lawsuits, the delay and uncertainty therein and their causes, we are brought face to face with the question of remedy. This is the work partly of the Legislature, partly of the courts, and partly of the bar. The due share of each, we hope, may be made to appear as we go along. We have endeavored to give a brief summary of the usual proceedings in a hotly contested litigation. They may be different in details in different States, but their essential features are the same in all. The delays in the various processes have been explained. We see where they occur and why they occur, and the only question remaining concerns the remedy.

Instantaneous justice is an impossibility. Even if the plaintiff alone were to be heard, the proper consideration of his claim would require some deliberation. Hence a little delay, at least. And if the defendant comes into court, he must be heard also. Hence more delay. And then the sittings of the courts are, to some extent at least, periodical. The nearest approach to a continuous sitting of the highest courts of first instance occurs probably in the city of New York, where trial courts are in session from the first Monday



to the last Saturday of every month, except July, August, and September. Bearing in mind, then, the necessity of giving to each side the opportunity of being fully heard; bearing in mind also the periodical sitting of the courts; and bearing in mind further the causes of uncertainty, as we have explained them, we are to inquire what can be done to lessen the delay in the successive steps of the controversy and the uncertainty of the final result.

#### REMEDIES.

We have almost imperceptibly fallen into some observations respecting *remedies*, as we were discussing the *causes* of delay and uncertainty. We are now to proceed with the latter, at the risk of some repetition. A simple and direct method of procedure should be everywhere provided, without a single unnecessary distinction or detail, and without division into legal and equitable actions, or into different forms of legal actions. There is enough in the law to be learned without the study of needless distinctions and processes. The statement of claim and defense, that is the pleadings, while they should be written, in order that the contestants may know and the courts may know precisely what is alleged on either side, and that a record may be kept for future use, should be as short as possible, and easy of amendment, in order that justice may never miscarry, from honest mistake. They should be delivered between the parties or filed with the clerk, at any time in vacation or in term. There can be no need of waiting for the sitting of a judge.

The issue being joined and the parties thus apprised of the precise points of contention, the trial should follow speedily. A few days may be necessary for this preparation. Witnesses are to be summoned; they may not all be at hand; and a commission to examine them may be necessary. How much of delay this may occasion can not be foretold, and must be left out of the calculation. But, when the parties are ready for the trial, there should be, as already insisted, a tribunal ready to hear them. In some of the States the courts sit only twice a year, so that a delay of six months may occur before a trial can be had; and in some States a continuance over the first term is matter of right. Thus, it seems that there are



communities in which it is thought necessary to give a party, charged with an infraction of law, a year's breathing-time before answering. If the rule of Magna Charta, four courts a year in each county, and every case in readiness tried, was a good one six hundred years ago, nothing less should satisfy us now. In some of the States their constitutions may not allow the establishment of courts sufficient to clear off all the cases as they arise. The constitutions, then, are at fault, and the people, who are the ultimate sources of justice, as of all other attributes of government, can, by amendment, make their constitutions elastic enough to allow courts and judges to be increased or diminished, according to the urgency of demands for justice. And we venture to affirm that the State fails in its duty to its people, when it allows its courts of justice to adjourn, leaving untried any case ready for trial.

If anything could make one doubt the capacity of a people for self-government, it would be the spectacle of its Legislature, profuse in its general expenditures, and niggardly in its appropriations for the administration of justice. Nothing can excuse the neglect to provide a judicial force sufficient for all the legal business of the county or the state, sufficient in quality and quantity, for one is of no use without the other; and yet we see cases everywhere waiting for trial, without courts to try them, and we see in many quarters judges so poorly paid that judicial places offer no temptation to those who are fit to fill them. We have even seen Congress twice within three years failing to make appropriations for the pay of jurors, so that for a while in some of the circuits of the United States no jury trial could be had.

The trial, being opened, should be carried to its end just as fast as can be done with safety. But its duration depends more upon the judge and counsel than upon legislation. The law, indeed, can do but little to counteract mismanagement, or supply the want of discipline in the court. It can, indeed, call the judge to account, when he is halting in his duties. He can, if he will, be prompt, strict, and firm; he can so control the cause as to leave no chance for dawdling or impertinence; he can exact implicit obedience to legal rules, can require quick questioning and short speeches, reject repeated or inso-

lent questions, whether objected to by counsel or not, and can continue the sitting longer or shorter as he finds expedient. And the respective counsel can assist the judge in all this, and none the less protect every right of their clients. Among other things, the judge can prevent a trial from degenerating into a contest of abuse toward party and counsel or an onslaught upon witnesses. It is painful to see reported, as we do so often, the insulting language thrown at parties, counsel, and witnesses, without a word of rebuke from the judge, who sits with as much apparent unconcern as if it were a thing of course. There are too many of these instances to be lightly passed over. It might do, in Coke's time, to address a party, as he addressed Raleigh, with "*Thou viper, I thou thee, thou traitor!*" but it will not do in these our days. It is high time that an end were put to the unseemly exhibitions in some of our modern courts.

Most of us can call to mind two judicial districts, side by side, in one of which the judge is alert and firm; he keeps his business well in hand and clears his calendar every time; the other is a good lawyer and a good man, but he is feeble and indulgent; the lawyers run away with him; and the suitors run from him; he is always in arrears, and the arrears grow year by year. Yet these two judges are holding office under the same authority and administering the same laws. Is it impossible to make the last judge follow the example of the first?

We have said that legislation can not do very much to shorten trials. But where so much depends upon the judge, we suggest the advantage of concerted action, and recommend that the judges of each State meet from time to time for consultation upon the best methods of maintaining the discipline and efficiency of the judicial establishment. Legislation, however, can provide that the verdict of the jury be special in every case, if required by either party or the court. This, as has been said already, will often save the necessity of a new trial, even though some of the exceptions may be found to have been well taken. The practice prevails in England under the judicature act, and has lately been adopted in Nova Scotia, where it is said to have proved successful.

There is a provision in the law of New York that "an error in the admission or exclusion of evidence, or in any other ruling or direction of the judge upon the trial, may, in the discretion of the court which reviews it, be disregarded, if that court is of opinion that substantial justice does not require that a new trial should be granted." One would think this comprehensive enough to prevent new trials, except for grave reasons; nevertheless, the instances are few in which an error at the trial has been shown, without drawing after it a new trial of all the issues. This is greatly to be regretted. Indeed, we do not see how the assumption that an error at one trial must entail after it a new trial, unless it appears that the error could not possibly have affected the verdict, can result in anything but delay heaped upon delay. Where there is no constitutional provision to prevent it, the judges might well be intrusted with power to dispose of the case, upon the evidence or special findings, without sending it back to a jury, unless the issues are of a kind which specially require the intervention of that body. The laws of evidence are neither many nor difficult. The questions which most frequently arise under them and are made the occasion for new trial, are less commonly questions of law than of logic, in respect of which an educated person off the bench may be as good a judge as one on it. For example, suppose that in a suit against a surgeon for an unskillful operation the question were asked whether he had sent in a bill for the service, should the question be admitted? Why not? The neglect of one who lives by his profession to claim compensation for his services is a circumstance which most men would regard as of some weight in judging of his own consciousness of having failed of his duty. And, at all events, a just inference from the neglect is as likely to be drawn by the jury as by the judge. But surely the admission of the question should not be a reason for ordering a new trial.

The verdict being rendered, and judgment pronounced, the preparation of appeal papers if an appeal be taken is, or should be, merely clerical. Nothing new should be put into the record, nothing important should be taken out of it. Whatever of delay there be after judgment once pronounced,



is in the hearing and deciding of an appeal. Here, where there ought to be little delay or none, it is great and scandalous. Where does it occur? In the *hearing* more generally than in the *decision*, though often in both. In the Supreme Court of the United States the decision, except in very exceptional cases, follows rapidly on the heels of the argument. So it does in the Court of Appeals of New York, and so we suppose it does in the highest courts of the other States. What, then, is to be done to provide a speedy *hearing*? Fewer appeals, and judges enough to hear them, that is all. When we say judges enough to hear them, we mean judges enough to hear them as soon as they arise.

The obligation of the State to all its people is plain: it is to provide a competent and honest judge to hear and decide every question of an infraction of the laws; this obligation is absolute; but, when it is once fulfilled, the obligation to give also an appeal is qualified by circumstances. First, the State ought not to provide for allowing an appeal, if it can not provide for the hearing of it. It might as well offer an empty cup to a man dying of thirst. So much is clear. Nor ought it to allow an appeal, if the presumption is great that justice has already been done, as in the case of two concurrent courts, unless a certificate be given by a judge that the case ought further to be examined. When, indeed, a question of public importance has arisen in respect of which a uniform rule throughout the state or nation is imperative, an opportunity for the establishment of such a rule must be given, and when it can only be given through the highest judiciary, as in case of a constitutional question, then an appeal to the highest judiciary should be allowed. These are the two conditions which qualify the right of appeal, and applying these rules will enable us to solve all or nearly all the problems which confront us, as to the number of judges and the number of appeals.

The judges of all courts, except those of last resort, should be compelled to render their decisions within a fixed period. How they can hold back their opinions as they do is a marvel which we should not believe were we not used to it. It is hard to conceive how any one, having a proper sense of re-



sponsibility, can leave upon his table, untouched, day after day, papers which might relieve painful anxiety, perchance save from discredit or bankruptcy. One thing is certain, that either judges account it unimportant what they decide, or they think nothing of withholding that which they were specially appointed to give, and that which suitors have a right to demand. Many cases in the lower courts—most of them, indeed—could be decided immediately upon the argument. The subject is then fresh in the minds of the judges, and the conclusions they reach at the close of the argument, if they were obliged to announce them then, would, in nine instances out of ten, be as just and as satisfactory as if they were given a week or a month or a year afterward. We fear that the inclination to write an opinion may unconsciously influence the mind to keep the case under advisement. Maryland and California have put into their constitutions a command upon the judges to decide within fixed and short periods. The example of these States in this respect is worthy to be followed.

We think that the following should be deemed fundamental maxims of government, in respect of the judicial establishment :

I. The Constitution should provide for one permanent court of last resort in the State, to which appeals should be so limited as not to exceed the capacity of the court to hear and decide them as they arrive. And if it should ever become so overburdened as to be obliged to adjourn for a term without hearing all the cases in readiness, further appeals should thereupon be limited until the court can clear off the arrears, together with the current business. Temporary commissions should not be resorted to in courts of last resort.

II. The Constitution should also provide not only for permanent inferior courts, equal to the business of ordinary times, but for temporary commissions, as occasion may arise, to clear off arrears in the courts of first instance.

III. The methods of procedure should be as direct and simple as possible; without one unnecessary distinction, or one unnecessary proceeding.

IV. The number and distribution of the judges, the frequency of the courts, and the simplicity of the procedure should be such, that, when the witnesses are in the State, the most strongly defended lawsuit may be terminated in the court of first instance within a few months, and even should the case go to the utmost limit of appeal in the State, it may be terminated within a year at most, from its beginning in the court of first instance to its ending in the court of last resort.

THE CONCLUSIONS AT WHICH WE HAVE ARRIVED ARE THAT THE PRESENT DELAY AND UNCERTAINTY IN JUDICIAL ADMINISTRATION CAN BE LESSENERD, AND BY MEANS AS FOLLOWS :

I. Summary judgment should be allowed upon a negotiable instrument or other obligation to pay a definite sum of money at a definite time, unless an order of a judge be obtained, upon positive affidavit and reasonable notice to the opposite party, allowing the defendant on terms to interpose a defense.

II. In an ordinary lawsuit the methods of procedure should be simple and direct, without a single unnecessary distinction or detail; and whatever can be done out of court, such as the statement of claim and defense, should be in writing and delivered between the parties or their attorneys, without waiting for the sitting of a judge.

III. Trials before courts, whether with or without juries, should be shortened, by stricter discipline, closer adherence to the precise issue, less irrelevant and redundant testimony, fewer debates, and no personal altercation.

IV. Trials before referees should be limited in duration, by order made at the time of appointment.

V. The postponement of a trial should not be allowed, because of the engagement of counsel elsewhere, nor ever except in strict conformity to rules previously made by the judges, and for reasons of fact known to the court or proved by positive affidavit.

VI. The record of a trial should contain short-hand notes of all oral testimony, written out in long-hand and filed with the clerk; but only such parts should be copied and sent to an appellate court as are relevant to the point to be discussed

on the appeal, and if more be sent the party sending it should be made to pay into court a sum fixed by the appellate courts by way of penalty.

VII. A motion for or against a provisional remedy should be decided within a fixed number of days, and if not so decided the remedy should fail. A week is time enough for a judge to hold such a motion under advisement. If he can not within seven days make up his mind that a provisional remedy should stand, it ought to fall. In all other cases a decision within a fixed period should be required of every judge and every court, except a court of last resort.

VIII. The ordering of new trials should be restricted to cases where it is apparent that injustice has been done.

IX. Whenever a court of first instance adjourns for a term, leaving unfinished business, the executive should be not only authorized but required to commission one or more persons, so many as may be necessary, to act as judges for the time being and finish the business. Such temporary judges should be commissioned in all courts except a court of last resort.

X. Whenever a court of last resort adjourns for a term, leaving unfinished business, further appeals to it should be so limited as to bring the cases before it speedily down to the limit of its ability.

XI. The time allowed for appealing should be much shortened. One month, or at most two, should seem to be enough in all cases.

XII. Greater attention must be paid to the selection of judges; without which no other reform, however good in itself, can succeed.

XIII. The law itself should be reduced, so far as possible, to the form of a statute.

XIV. Statistics of the litigation, in the courts of the United States, and of each State, should be collected and published yearly, that the people may know what business has been done, and what is waiting to be done.

In conclusion, we are obliged to admit that most of the blame for the delay and uncertainty which we have been discussing rests upon the profession of which we are members,

in both its branches, whether on the bench or at the bar. We are a host in numbers; we have influence, direct and indirect, greater than that of any other profession or class of men in the country; we are part and parcel of the judicial establishment; we know best the laws of the land as they are, and we should know best what they ought to be; we can make ourselves heard and heeded in every legislative hall, in every executive chamber, and on every bench of justice; and we have given pledges, not less binding because not expressed in words, that the functions with which the State has endowed us shall be used to promote justice, not alone by assisting suitors in their private controversies as they arise, but by doing our best to make the occasions of such controversies as few as possible, and the issue thereof as speedy and as near the right as we can make them. That we have failed so long to redeem these pledges is no reason for failing longer. Let us redeem them now.

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## SECOND REPORT.

SARATOGA, AUGUST 18, 1886.

*To the American Bar Association :*

THE special committee, on the Delay and Uncertainty in Judicial Administration, has the honor to make this its second report, as follows:

The committee, as originally appointed in 1884, consisted of the first two signers of the present report and three other gentlemen, one of whom died before acting, and the others went out of the country before the report was made. The two members remaining made a report, concluding with fourteen recommendations, nine of which were adopted without modification; two were adopted with modification; two were stricken out, with the consent of the committee; and one was postponed to the next meeting. Those adopted were the following:



I. Summary judgment should be allowed upon a negotiable instrument or other obligation to pay a definite sum of money at a definite time, unless an order of a judge be obtained, upon positive affidavit and reasonable notice to the opposite party, allowing the defendant, on terms, to interpose a defense.

II. In an ordinary lawsuit the methods of procedure should be simple and direct, without a single unnecessary distinction or detail; and whatever can be done out of court, such as the statement of claim and defense, should be in writing and delivered between the parties or their attorneys without waiting for the sitting of a judge.

III. Trials before courts, whether with or without juries, should be shortened, by stricter discipline, closer adherence to the precise issue, less irrelevant and redundant testimony, fewer debates, and no personal altercation.

IV. Trials before referees should be limited in duration, by order made at the time of appointment.

VI. The record of a trial in every court, in which official stenographers are in attendance, should contain short-hand notes of all oral testimony, which notes, if the court shall so order, shall be written out in long-hand and filed with the clerk; but only such parts should be copied and sent to an appellate court as are relevant to the point to be discussed on the appeal, and, if more be sent, the party sending it should be made to pay into court a sum fixed by the appellate court, by way of penalty.

VII. A motion for or against a provisional remedy should be decided within a fixed number of days, and if not so decided the remedy should fail. In all other cases a decision within a fixed period should be required of every judge and every court, except a court of last resort.

VIII. The ordering of new trials should be restricted to cases where it is apparent that injustice has been done.

IX. Whenever a court of first instance adjourns for a term leaving unfinished business, the executive should be not only authorized but required to commission one or more persons, so many as may be necessary, to act as judges for the time being and finish the business. Such temporary judges

should be commissioned in all courts except the court of last resort.

XI. The time allowed for appealing should be much shortened. One month, or at most two, should seem to be enough in all cases.

XII. Greater attention must be paid to the selection of judges, without which no other reform, however good in itself, can succeed.

XIV. Statistics of the litigation, in the courts of the United States and of each State, should be collected and published yearly, that the people may know what business has been done and what is waiting to be done.

The recommendation, which was postponed to the present meeting, was the following: "The law itself should be reduced, so far as possible, to the form of a statute." This will be first considered.

#### REDUCTION OF THE LAW TO STATUTORY FORM.

The committee as reorganized have considered this recommendation anew and readopt it. The reasons given by the original committee leave little to be added. There are now in this country but two ways of making law, and these are legislation and litigation. We prefer legislation. Whether there was ever, at any time in any country, reason for judge-made law, it would be profitless to discuss. We affirm that there is not now, in this country, any reason for it whatever. It is illogical, unsafe, and contrary to the American theory of government.

The recommendation of the report would not commit the Association to any particular scheme of codification or to any form of statute. But we are unwilling to believe that the wit of man is so feeble and the English language so defective, that rules of law which are capable of expression in judicial decisions can not be expressed in statutes. The existing statute-books themselves show the fallacy of such an opinion. A large portion of the law is already codified. What we insist upon is that the uncoded portion of the common law, so far as it is settled by judicial decisions, should be enacted by the Legislature in as brief a compass as possible, and published for

the use of judges and lawyers, and for the information of the people. We repel the idea that the reduction of the law, so far as practicable, to the form of a statute, would check the natural growth of law. We ask that the processes of legislation be reformed and improved, and that the making of the rules of law, by which all the members of the body politic must be governed, be not left to the shifting decisions of judges in private litigations between A and B or B and C, which may perchance be given in collusive suits between private parties, represented by incompetent counsel, the public having no opportunity and no right to be heard and consulted as to the propriety of the rule which the court declares. Then the people should be enabled to know beforehand, so far as possible, by what law they are to regulate their conduct, instead of having their rights disposed of as may happen, and in point of fact does not infrequently happen, under the system of judge-made law, by a judicial decision which in its operation upon the case in which it was decided, and upon other existing transactions or conditions of the same kind, has all the injurious effects of retrospective law. If the law is reduced to the form of a statute, the office of the judicial tribunals will be, for the most part, *interpretation* instead of *legislation*. Judicial legislation will measurably cease and the office of making laws will be left to that department of the government which was created for that purpose. We repeat that the real question is whether the American people should be governed by legislation or by litigation.

The precedents cited in the briefs of counsel and the opinions of courts are simply statements of the conclusions upon law and fact in particular cases. The point of the decision was not an abstract rule of law, but the right of A or the right of B in the circumstances developed on the trial. The rule is inferred from the reasoning, or, if there be no opinion delivered, from the mere fact of a decision one way or the other. When, then, we say that our common law is a law of precedents, we mean that it is a law of *inferences* from precedents. The inferences may be correctly drawn or they may be drawn incorrectly. It would hardly be probable that two persons should draw precisely the same inferences. Hence

arises one of the reasons for a code, that is to settle the inferences. In no other way can any stability be given to common, that is unwritten law, for the next precedent may tend as much to confuse as to enlighten the reader upon the just inference to be drawn from the previous one. Precedent is heaped on precedent, that is, precedent in explanation of precedent, which is the same as to say the inference from the first precedent is attempted to be explained by inference from the next precedent, and so on in a congeries of inferences from a congeries of precedents.

It is related of Lord Mansfield that he advised a friend, who was not a lawyer, going out to be governor and chancellor in one of the dependencies of England, not to give reasons for his judgments, "for," said he, "your judgment will probably be right but your reasons will certainly be wrong." What sort of a common law would this chancellor make? That kind of law is a series of inferences from reasons given for decisions, but, says the great chief-justice, make the decisions but give no reasons, for they will certainly be wrong. If this advice were good and the colonial judge were a sample of other judges, the common law would be deemed a series of wrong reasons for right judgments. It is amusing to hear the criticisms sometimes made upon particular articles or sections of a proposed code; that this section, or that section, is not the law, meaning that it is not a just inference from the reasoning of a particular precedent. This critic thinks so, but the next critic thinks differently, and among a dozen lawyers there may be a dozen opinions. Which is right and which is wrong it is the function of the Legislature to declare.

An unwritten or inaccessible law is un-American. The law of the Legislature, as distinguished from the law of the courts, is the necessary sequence of the American doctrine, that the functions of government should be apportioned between three great departments, legislative, executive, and judicial. Our practice is inconsistent with our theory. Indirect methods, subterfuges, and shams are not in accord with our professions or our traditions. Whatever we do, we at least pretend to do not covertly but openly. When we want a constitution of government we write it. When we want a treaty with another



nation, we write it. If we seek to make plainer our relations with the other nations of the earth, we do not leave those relations to the decisions of the tribunals, but we put them in writing as plain as possible, that they may not be misunderstood. So we did when the great Frederick and the greater Franklin came together to frame the most enlightened treaty ever made; so we did when in 1871 we dealt with England for the depredations of the "Alabama." We did not create the Tribunal of Geneva to pass upon questions of international law, as they lay in the usages of nations and the precedents of the tribunals delivered from time to time through ages. We did not send counsel to Switzerland to read from Grotius and Vattel and the long line of publicists and judges, called the sages of the law, but we first agreed with our adversary about the law, and put into writing the rules by which the tribunal was to judge, and then and not till then we called the tribunal itself into being, not to judge by the inner light which is supposed to burn in the breasts of judges, or by the innumerable books which the jurists of all ages have placed upon our groaning shelves, but by few rules of law, framed with deliberation, written with care, and stamped with authority.

What have we done about the rules of navigation? There lay the rules of the common law from the earliest ages, from the days of the sea-kings, from Wisbuy and Oleron, from the time when the Colossus of Rhodes bestrode the gateway of Eastern commerce. Why did not modern commerce content itself with them? There were decisions in English courts and in our own; why not work with them? Why have rules of navigation in these our days been framed, written in all tongues, posted in the log-books of mariners, displayed in insurance offices and wherever merchants most do congregate?

One of the trite threadbare arguments against codification is the history of the statute of frauds. See here, the anti-codifiers say; here is a little statute of a few lines, and behold what a host of questions and decisions has it given rise to! Well, would you have had no such statute? Would you repeal it? Was that English judge demented who declared that every line of it was worth a subsidy? The Constitution of the United States is, according to these anti-codifiers, another awful ex-

ample of the evils of written law. See, they exclaim, what volumes of commentaries from "The Federalist" down, what crowds of decisions made in these hundred years on that little code! Well, again, would you undo it? One is tempted to ask of these gentlemen, Do you take us to be children, that you would foist upon us such nonsense?

These men forget how it appears in the whole course of English and American history, that when a victory for freedom was won, in the establishment of great rights or duties, they were written down, that they might never be mistaken or disowned. So it was with Magna Charta, so it was with every petition or bill of rights which for so many ages the people of England struggled for and the crown resisted. Even so long ago as 1771, when it was proposed in England upon trials for libel to substitute for judge-made law the written law of Parliament, Burke, in answer to the objection that the matter should be left with the judges, declared that, "if so, very ill would the purchase of Magna Charta have merited the deluge of blood which was shed in order to have the body of English privileges defined by a positive written law."

It is not necessary, however, to go back to the past century or to past decades for evidence or illustration. We are speaking of our own country and our own time, and we say we need a code. We will not stop to inquire whether the people who lived in England or America before the American Revolution needed it, but we say that we who live here now need it. The literature of this country, and the same may be said of England, demands it. However strong may be the body of lawyers, and they are strong, and it is for the common weal that they should be strong, for they are one of the great conservative forces of society, they are not so strong as the people, the men of letters, the thinkers, and the writers, who are bound by no ties or prejudices of profession or classes, but who reason and speculate, study history and compare systems, and reach their own conclusions from facts they themselves have learned; men, for example, like Bacon, Hallam, and Macaulay. If the lawyers can stand up against this incoming tide of reasoners, writers, and speakers, they are stronger than we think they are.

We forget, moreover, that our condition is different from that of England, and that even if codification were not good for that country, as we think it undoubtedly would be, yet it would be good for this. For do we not inhabit separate States, eight-and-thirty in number, each with its separate system of procedure, to say nothing of substantive laws? And is not the number of the States, and the number of those who people them, increasing with an ever-accelerated current? We shall have, says Bancroft, at the end of a hundred years more, five hundred millions of people, and he might have prophesied that we shall have a hundred States. Is it conceivable that we shall then endure the judge-made law, or the law of precedents, whichever it may be called, of the multitudinous judges of those hundred States? A code of Federal procedure is already recommended by a justice of the Supreme Court of the Union, and a bill for such a code was introduced in the Senate at the last session of Congress.

The resolution XIII, which was laid over at the last meeting of the Association, does not declare that the law should be reduced to a *code*; it merely declares that it "should be reduced, so far as possible, to the form of a statute." We think, indeed, that the resolution would in the end lead to a code, as a logical sequence, because we think that so much of the law can be reduced to statute as to result in a code. Some persons, however, may be of opinion that it is possible to reduce only a small portion of the common law to a statutory form, not enough to entitle the product to the name of code. Then if only a few of the rules can be so reduced, the work is easier done; if many, the work is the more necessary to be done. They who do not think a code attainable may nevertheless with consistency adopt the resolution as a just one. None can vote against it, but he who thinks that not a single rule of the common law, though quite possible to be reduced to the form of a statute, should be placed in the statute-book, not even the law of bills, cheques, and promissory notes, as has been done in England within the last four years. If any lawyer is willing to stand upon that opinion, we leave him to the people. Let him say to them, if he will: "I know very well that we can write down, in the form of enactments, many, or



at least some, of the rules of law, which are the measures of your rights and duties, but we will not do it or have it done ; we prefer to tell you from time to time what they are, as you call upon us at our offices or in the courts."

Here is the conclusion of the whole matter. The common law is made by the lawyers, from time to time ; lawyers on the bench and lawyers at the bar. They say, or rather many of them say, such is their proper function. Some, modest men that they are, call themselves a trained body of experts just fitted for the work ; others, more modest, insist only that theirs is the true method of generating law. A free people who have framed their institutions, on purpose to keep the three departments of government, the legislative, executive, and judicial, separate and independent of each other, will not always submit to this assumption. They will not sit quietly by and see their laws made by the lawyers. The seventy thousand in the United States, though a host counted by themselves, are yet but a handful counted by the side of sixty millions of their countrymen. These are considerations which we, members of this Association, and all members of our profession, everywhere in the country, may profitably take to heart.

#### NEW SUBJECTS.

The action of the Association in recommitting the original resolution on delay and uncertainty to the committee, appears to us to imply not only that the recommendations adopted at the last meeting are to stand, and the one postponed to this meeting, to be further considered, but that any other matter relating to the general subject of the original resolution may be considered by the committee. Upon this understanding of the scope of their inquiries, they appointed their junior member secretary, and sent out a circular to members of the Association, to the judges of the highest courts, Federal and State, and to other prominent members of the profession, containing a number of questions upon topics which it was proposed to consider. A large number of replies to this circular have been received, which have been copied or condensed, and the result, together with the circular itself, will be found in the appendix to this report.



Proceeding, then, to the discussion of the new subjects mentioned in the circular, we will follow the order there taken.

First :

### THE SYSTEM OF TRIAL BY JURY.

Great dissatisfaction exists with trial by jury. This dissatisfaction appears to be increasing with the general advance in popular intelligence. The magazines and the newspapers have for several years teemed with criticisms upon what is called the jury system. These criticisms have called forth defenders of the system, and the result is that the subject is undergoing a very thorough and thoughtful discussion. We do not propose so much to make our own arguments for or against trial by jury, as to call attention to its history, the changes it has undergone in different places, the views entertained by its advocates and defenders, the arguments generally used on both sides, and to recommend improvements in the selection of jurors and the conduct of the trials by them. During the first fifty years of the American Union a tendency was discernible to enlarge the right of trial by jury and to insert guarantees of this right in the constitutions, Federal and State. The right was pushed to extreme limits. The power of the jury was constantly enlarged and the power of the judge correspondingly curtailed, until in some jurisdictions, as in Missouri and several other Western States, the judge in a jury trial is little more than a moderator in a town meeting, whose duty it is to see that the rules of debate are strictly observed.

The system has passed through several notable phases. In the first, or original phase, the idea of trial by jury was a trial by *witnesses* to the fact. The jury consisted of twelve men of the vicinage—that is, of the immediate vicinity where the act in dispute was alleged to have been done—and they decided upon their own knowledge and neighborhood rumor. That was the original idea of our rude Saxon ancestors. This idea has undergone such a change that now the fact of a juror having personal knowledge of the transaction is generally regarded as a sufficient ground of challenge, and the fact of his having formed or expressed an opinion either upon personal knowledge, upon newspaper report, or upon common rumor, if the opinion be of such a character as to render it improbable that

he could come to an unbiased decision, is a legal ground of challenge. So that, what in the early stages of the institution was a necessary qualification for the juror, is now a legal disqualification. Nevertheless, an inveterate conservatism has clung to the system during the course of the centuries which have witnessed this transformation in its fundamental idea and principle. It is deeply imbedded in popular affection and in popular prejudice. A superstitious veneration attaches to the number twelve. In the popular imagination there is something akin to magic in it. No bill of indictment can be returned in most jurisdictions by a less number of grand jurors than twelve; and, except where recent constitutions have made an innovation, no verdict in the most petty civil cause returned by less than twelve men is good, unless the defect is waived by the party against whom it is rendered; while in a trial for felony the right to have the verdict returned by exactly twelve men is a right which the accused, according to some decisions, is incapable of waiving.

The arguments against the system are generally the following: The plan of committing the decision of the facts in litigation to a large number of men drawn from the body of the community, inexperienced in the sifting of evidence, unacquainted with the artifices of advocacy, is, when considered by itself, one of the most clumsy and artificial that can be devised. Worse tribunals have existed, it is true, in the course of civilized history. The Anglo-American trial by jury is one degree better than the trial by the Athenian Areopagus. A trial by a limited assembly of men elected for the particular occasion is preferable to a trial before the general public, just as a representative body is superior for legislation to an assembly of the entire mass of freemen or voters. The general superiority of a trial before a judge who is trained to the sifting of evidence, experienced in the habits of witnesses, and strongly disciplined in mind, over a trial before an accidental body of twelve men, taken temporarily from their business, acting under a feeling of restraint and awkwardness which springs from being placed in a new situation, suffering in their private affairs and anxious to return to them, must be apparent upon the least reflection. Observe the difference between the

methods employed by advocates where the trial is before a jury and where it is before a judge. The former is very commonly, where advocates of a certain class are employed, characterized by attitudinizing before the jury; disingenuous offers of incompetent evidence which it is known beforehand the judge will exclude, and which evidence the counsel could not produce if it were admitted; side bar remarks, looks, and gestures; attempts to excite sympathy on the one hand or prejudice on the other. An argument before a jury is in many cases of such a character that it would be an insult if delivered to a judge sitting as a trier of the facts.

The experience of civilized men has convinced them that the highest success results from a division of labor, whereby men become expert in particular departments of human effort. Accordingly, in order to achieve the best results in any given department of human effort, the particular work must be committed to those who are experts in such work. This rule is universal; but it is ignored in the system of trial by jury. That system, when analyzed and applied to complicated transactions or controversies, is as absurd as it would be for the owner of a ship, which required a crew of twelve men, to choose for that purpose a lawyer, a doctor, a clergyman, a merchant, a banker, a carpenter, a shoemaker, a farmer, a capitalist, a vagrant, a saloon-keeper, and an astronomer; and, putting this motley crew under the direction of one man experienced in navigation but unacquainted with the particular ship, should turn it adrift and trust to Divine Providence for a safe voyage.

We have in our judicial system the two forms of trial, trial by judge and trial by jury, standing side by side and undergoing constant comparison with each other. In cases for equitable relief, in cases of admiralty and divorce, and such as belonged to the ancient ecclesiastical court in England, the trial is by the judge. In civil actions for damages, the trial is by jury. Now, whatever arguments may be put forth concerning the merits and demerits of these two systems as they thus stand side by side inviting comparison, this conclusion can not be gainsaid, that there is no such fundamental difference between the jurisdiction of the different courts, no such



difference in the questions of fact brought before them in civil suits, as to produce any essential or necessary difference in the methods by which either tribunal must proceed to ascertain controverted facts. In point of law the rules of evidence are in general the same in the different classes of judicatories. This being so, it can scarcely be possible in the nature of things, when the wide difference in the character and experience of the triers of the facts in these two classes of judicatories is considered, that the results achieved by those of one class are not better than the results achieved by those of the other class. That is a proposition which public opinion ought to face and consider. Now, if the results, or in so far as the results of trial by judge are better than the results of trial by jury, the good of society requires that trial by judge be extended and that trial by jury be curtailed. On the other hand, if the results of trial by jury are better than those of trial by judge, the good of society requires that trial by jury be extended and that trial by judge be curtailed. The system which a sufficient experience has shown to be better than the other ought to displace the other. If the voice of the bar could determine the matter, there is scarcely a doubt what that voice would be. In those States where, except in certain proceedings, a choice is given to litigants to bring their actions in chancery or at law, as for instance in the State of Tennessee, the courts of law are neglected and the courts of chancery are overrun. Trial by judge is a favorite mode of trial with good lawyers, and trial by jury with poor lawyers, with disingenuous lawyers, with lawyers who resort to low subterfuges and to unconscionable means of obtaining the desired result in a pending litigation. A litigant who has a good cause which he believes to be founded in justice will generally prefer to submit it to a judge of candor and reputation than to submit it to the accidents of a jury trial. If the grounds of the popular affection for trial by jury were analyzed, it is believed that the most substantial reason for preferring this tribunal is that there is in every community a class of people who do not favor a rigid execution of the laws. They love the jury system because this mode of trial is a negative upon the execution of the laws in what are deemed to be hard cases ; because it is a



sort of popular pardoning power, where twelve men, in violation of their oaths, may render a verdict against the law and the evidence. This affectionate regard for jury trial is most conspicuously displayed in cases where murder is committed to avenge wrongs done against family or domestic honor, and where, according to a loose public judgment, no punishment ought to be inflicted, although the crime is denounced by the law of the land. Instead of committing the dispensation of pardon exclusively to the executive where it is lodged by the constitution, it is by this system committed also to twelve men of the neighborhood, who dispense it in violation of the oaths which they take at the commencement of the trial. It may well be believed that if the reason why so many continue to prefer this clumsy and otherwise unsatisfactory mode of ascertaining the facts in litigation were carefully analyzed, one reason would be found to be that the trial by jury *is a popular negative upon the execution of the laws*. This reason is never expressed in so many words, but it is continually implied by eulogists of the system in the statement that in every period of English history the jury has been found a bulwark against executive tyranny. That is no doubt true. The jury has been found a bulwark against executive tyranny in former times, and it has also been found a bulwark against executive effort in later times to enforce the laws. In our system of government, Federal and State, where the powers of government are carefully divided, where the executive power is committed to magistrates chosen for short periods of time, whose duties are defined by written constitutions and checked by a powerful judiciary, the necessity for upholding this species of trial upon the idea that it is a bulwark against executive tyranny does not in fact exist.

Such are the arguments against the system. On the other hand, we are confronted with the facts that the institution has been established for many ages, is grounded in the affections of the people, gives them an interest and an insight regarding the workings of their government, is a bulwark against the partiality of judges, and generally does lead to just verdicts, when held before competent judges.

These observations are made, not with any expectation that

trials by jury even in civil cases, will be done away with in our day. It is not possible now, it may never be possible, even in such cases, to discontinue it altogether. But the observations may be useful in considering the formation of the jury and the regulation of its functions, and those of the court, and in limiting the cases in which the jury may be required; in all which respects the different States do now very much differ.

In some of the New England States the jurors, for both the grand and trial juries, are chosen annually in the town meeting, and are generally persons of some training for such a function. In other States the list commonly includes the greater portion of males of full age. The exemptions which may be claimed are many in number. It so happens, therefore, that, what with the admissions and what with the exemptions, juries do not in general consist of the citizens best qualified for the service. If there be such diversity in the qualifications of juries in the different States, there is greater in the regulation of their functions. The English system rests upon the idea that it is the office of the judge to declare the law and the office of the jury to find the facts. But at the same time the inexperience of the jury is aided by the experience of the judge, in so far that the judge not only declares the law to them, but he sums up the evidence and gives them his opinion of its weight and bearing, cautioning them at the same time that they are not bound by his opinion, except as to questions of law; in other words, under this system it is the *office* of the judge to *instruct* the jury as to the law, and it is his *privilege* to *advise* them as to the facts. Where this practice exists, a judge of candor and ability, who attends to the evidence given upon the trial, will have little difficulty in bringing the minds of the jury to a just result. This practice exists in the courts of England, in the courts of some of the older States of the American Union, and in the courts of the United States. If the jury system is to retain any of its ancient favor, the power of intelligent and experienced judges to control its workings, so as to secure just results, must be maintained, where it still exists, in its fullest force, and restored where it has been curtailed or denied. But, in the

courts of many of the newer States of the Union, the judge is prohibited, by constitutional ordinances or by statutes, from giving the jury the benefit of his opinion upon questions of fact. In some States the law has gone even beyond this: the judge is prohibited from summing up the evidence, lest in doing so he should give to the jury intimations of his opinion as to what the verdict should be. Nay, more, he is prohibited from charging them orally, but is required to give them instructions in writing; and in one State at least the law has gone to the extreme of requiring the judge to charge the jury in writing before the counsel argues the issues of fact to them. In that State the judge delivers a hypothetical written charge, composed in most cases of paragraphs handed to him by either counsel, though he has the power to draw written instructions of his own motion. These instructions are read to the jury, are then handed to them and are taken by them to their room upon their retirement to consider of their verdict.

The rule which requires the judge to charge the jury only in writing came into vogue at a period before the advent of the court stenographer. The real object of the rule was to enable counsel to get a fair bill of exceptions. But now, notwithstanding the intervention of the stenographer, the rule is maintained, and we have often this incongruous result, that the evidence is delivered to the jury by witnesses orally or read to them from depositions, but they are not allowed to take these depositions with them to the jury-room; while the charge of the judge applying the law to this evidence must be given in writing so that they can take it to their room and consider it. Now, it is just as important that the jury should take with them the evidence in writing as it is that they should take with them the judge's instructions as to the law in writing. It is just as essential that they should have the evidence before their eyes in making up their verdict as to have the instructions applying the law to the evidence. But we have sometimes in the same jurisdiction this inconsistency, that it is ground for a new trial if the judge allows the jury to take with them on their retirement the written depositions which have been read in the cause, or if he fails to instruct them in



writing so that they can take with them to their retirement the instructions which he gives them. The presence of a stenographer renders it no longer necessary for the judge to reduce his instructions to writing, in order that the unsuccessful party may have them fairly embodied in his exceptions; and it should seem that the statutes which make it imperative upon the judge to charge the jury in writing should be qualified by the proviso that this should not be necessary where there is an official stenographer by whom the charge, if delivered orally, may be reduced to writing, or where the parties may have provided themselves by agreement with a stenographer to report the trial.

The most valuable safeguards against judicial carelessness, oppression, or corruption have been found in the rule which requires the judge, at least in important cases, to give his reasons for decisions in writing. This practice is known to be so important a check upon hasty and perfunctory work by appellate courts, that in some of the States the judges of these courts are prohibited from rendering oral decisions. Moreover, the experience of the legal profession justifies the statement that the decisions of courts presided over by the most eminent judges have comparatively little weight when not supported by satisfactory reasons publicly given. A rule which has been found so important a safeguard to the carefulness and integrity of judges must be an equally important safeguard to the carefulness and integrity of juries; and it is a just conclusion that if juries could be required to give their reasons for their verdicts, a great many of the anomalous, absurd, and unjust verdicts which are returned by them would not be returned. The public judgment has become so thoroughly impressed with this fact that in several of the States statutes now exist under which it is the privilege of the judge or of either party to require the jury to answer certain interrogatories applicable to the issue as well as to return a general verdict. The statutes generally provide that, if the general verdict is inconsistent with the answers to the interrogatories, a new trial shall be granted, or that the particular answers shall control the general verdict. In other words, the jury is not allowed under this system to find that certain facts have or have not existed, and then to return



a controlling general verdict according to affection, passion, prejudice, or caprice; or, as often happens, according to loose views of justice and benevolence entertained by jurors. This new practice, wherever introduced, is said to have been attended with favorable results. It rests upon the obvious propriety of obliging the jury to tell how they found particular facts material to the general result, which is equivalent to requiring them to give *reasons* for their general conclusion. The practice, if it serves no other purpose, has the effect of requiring greater care on the part of the jury, of obliging them to analyze the evidence and to state their conclusions upon different elements of it in writing, a practice which is necessarily favorable to a correct result.

During the period when public opinion tended in an extravagant degree toward establishing the absolute independence of the jury, a doctrine sprang up in some of the States which was frequently called the "*scintilla* doctrine." This went so far that, if there was a bare *scintilla* or spark of evidence to support the verdict, the judge ought not to disturb it. The rule was applied more strictly in the appellate courts, when urged to set aside verdicts as contrary to the evidence. In some jurisdictions the doctrine assumed a form like this: that the trial court possessed a power over the verdict larger than the appellate court, because the trial judge had heard the witnesses and observed their manner of giving testimony, and for the further reason that, living in the community where the trial had taken place, he might reasonably be supposed to have some knowledge of the standing and the character of the witnesses. In those jurisdictions, therefore, it was assumed that the trial judge would not set aside the verdict unless it was clearly unsupported by evidence, and that the appellate court would not set aside a verdict, as being against the weight of the evidence, if there was a *scintilla* of evidence to support it.

The question frequently arises, in jury trials, under what circumstances the judge should submit the case to the jury at all; and hence, in those jurisdictions where the *scintilla* doctrine prevails, it has been the practice of the judge to submit the cause to the jury where there was a *scintilla* of evidence

which, if believed, would entitle them to render a verdict for the plaintiff, even for nominal damages. But, with the decay of the scintilla doctrine, a tendency is developed to adopt the sounder rule that the judge will not in any case submit the cause to the jury where he would feel bound, if the verdict were rendered against his views, to set it aside on a motion for a new trial.

We think that a proper check upon the incompetency, the mistakes, the prejudices, and the caprice of juries is found in the rule that the judge ought not to submit any civil controversy to them unless the evidence is of such a character as to leave the issue of fact to be decided fairly in doubt ; that is to say, unless in his opinion fair-minded men might disagree or hesitate as to what decision ought to be rendered upon it ; and if the judge, disregarding this rule, has inadvertently submitted the cause to the jury, he should not hesitate to apply the rule in determining whether the verdict should be allowed to stand. If the verdict is, in the opinion of the trial judge or the appellate court, clearly opposed to the weight of evidence, it should be set aside by the former on a motion for a new trial, or by the latter on appeal where the evidence is fully presented by a bill of exceptions and the appellate court is authorized to review the facts.

The proposition that it is desirable to give the judge power to sum up the evidence orally and to advise the jury as to the facts, involves, it is true, a necessary implication against the capacity of the jury to perform the work which the law commits to them. For, if the jury are more capable of deciding the facts than the judge, they do not need the aid of his opinion in deciding them. This is true, and it is also true that trial by jury is hedged about with a great many rules of evidence and procedure, which involve an implication against the sufficiency of the system. Some of the rules of evidence which have grown up under it would never have come into existence under the system of trial by the judge. In trials before judges alone the presumption is that they have sense enough to determine the value of evidence ; before juries the presumption is that sometimes they have not sense enough to determine it. Then, in regard to the conduct of juries, they are

encompassed with restrictions which have never been thought necessary in the case of a judge when he sits as the trier of the facts in most important controversies. Separating from each other and from the officer in charge of them; listening to outside remarks of the parties, or their witnesses, or of third persons, concerning the cause on trial; in some cases receiving at the hands of the successful party what, between neighbor and neighbor or citizen and citizen, are usually regarded as no more than the ordinary courtesies of life; these, or most of these, under varying rules and in different classes of trials, are regarded as reasons for setting aside the verdict and granting a new trial. In cases of equitable cognizance, in cases of admiralty or divorce, no principles exist which supply such rules to the conduct of the judge who sits as the trier of the facts. This jury of twelve "good and lawful men" are invested with a sort of sanctity in the popular estimation, and yet they are so little sanctified in legal estimation, that the law has found it necessary to environ them with restrictions which would be found humiliating and insulting if imposed upon a judge.

The truth is, that the jury is one of those institutions, not infrequent in the history of the race, which being established for one purpose and upon one theory, are maintained for a different purpose and upon an altogether different theory. As the best tribunal for the trial of civil causes indiscriminately, it is not now defensible; if defended at all it must be upon other grounds, such as protecting suitors against the partiality of judges, or accustoming the people to the consideration of judicial questions, or for other reasons already mentioned. No man in his senses would think of leaving the decision of a question of fact that may unfortunately have arisen between him and his neighbor to twelve men chosen by lot out of the mass of citizens; but when considering how best to protect the rights of all the people, at all times and under all circumstances of tyranny, of prejudice, or of panic, he might reason thus, let us establish an intelligent and independent judiciary to decide between man and man, but let us at the same time give to a suitor the right at his option in certain cases to call in the aid of a chosen body of his fellow-citizens.



For conclusions on this head, to be submitted for the consideration of the Association, we recommend the following, in addition to the eighth, adopted last year :

I. The greatest possible care should be exercised in the selection of jurors, much greater than is now exercised in most of the States. No person should be put upon the jury-list who is not known to be a person of probity, intelligence, and good repute. It should be borne in mind that a juror is in a very important sense a judge, though a temporary one, and something like the care required in the selection of permanent judges should be required in the selection of jurors.

II. A jury should not be called in civil cases unless demanded by one of the parties.

III. It should be made the duty of the judge in every case, civil or criminal, to instruct the jury as to the law ; and it should be his right, in the exercise of a sound discretion, to advise them as to the facts, cautioning them at the same time that they are not bound by his opinion except as to matters of law.

IV. The judge should not be required to reduce his instructions upon matter of law to writing, where a competent stenographer, appointed under a provision of law or selected by the parties, is present, by whom such instructions may be taken down as delivered.

V. The trial court on a motion for new trial, or the appellate court on appeal upon a question of fact, should set aside a verdict when it plainly appears to be unsupported by substantial evidence of a credible character, or to be contrary to the weight of trustworthy evidence.

VI. The practice of submitting to juries special interrogatories upon the material or controlling facts in issue, and of disregarding their general verdict when inconsistent with their answers to such interrogatories, ought to be extended.

#### THE RELIEF OF APPELLATE COURTS.

Last year's report of our committee discussed this subject and made these recommendations, which appeared to meet the approval of the Association : " The Constitution should provide for one permanent court of last resort in the State, to



which appeals should be so limited as not to exceed the capacity of the court to hear and decide them as they arise. Temporary commissions should not be resorted to in courts of last resort."

We have little now to say by way of argument beyond what was said in that report, but it may not be uninteresting to see what expedients have been adopted in some of the States. Some of them have created a court composed of six judges sitting in two sections. This experiment has been tried in Tennessee and in California. The result is believed to have been unsatisfactory. It is said that the two sections have assumed too much the character of separate courts. Even where both sections consulted upon every important case, the minds of the judges of one section were with difficulty brought to bear upon the business of the other section to any considerable extent. Overburdened with the business of their own section, their tendency would be to neglect the business of the other. The results had been that each section assumed to a considerable extent the character of an independent court, and the decisions of the two sections sometimes clashed with each other, thus introducing confusion and uncertainty into the law, at the expense of a dispatch of the public business.

In some States the experiment has been tried of assisting the Supreme Court temporarily in disposing of its arrears by creating a commission of appeal or a Supreme Court commission, to sit separately from the Supreme Court, to hear arguments in causes, and to decide them as is done in the Supreme Court. In some of the States this experiment has taken the form of creating a commission whose powers are apparently merely advisory, the judges hearing arguments and writing opinions, to be submitted to the Supreme Court and, if approved by the Supreme Court, to be reported as the opinions of the Supreme Court and to have the like effect as precedents. Devices of this character have little to recommend them to the favor of this Association. Where these commissions are created by the Legislature their constitutionality is more than doubtful, unless the Constitution in direct terms has conferred upon the Legislature the power to alter the constitution of the Supreme Court. Where the Supreme Court is created by the

Constitution, the number of its judges prescribed, their compensation fixed, and their duties declared, and where no power is vested in the Legislature to alter the constitution of this tribunal, upon what ground such power can be claimed for the Legislature is not perceived.

Passing by the question of the validity of such a contrivance, it should further be observed that it is a mere make-shift, and, while able lawyers have been sometimes found willing to occupy seats upon these temporary tribunals, they have been generally unwilling to abandon their practice for the short period of service and the doubtful honor which such a seat would give them.

We believe that the soundest plan for relieving the highest appellate courts is the establishment of intermediate appellate courts, and the division of appellate causes among them according to the subjects of the litigation or the amount in controversy, and that appeals upon questions of fact should be extremely limited.

We recommend the following resolution :

The law should provide for the settlement of the facts in the court of first instance, subject, perhaps, to one appeal, and the courts of first instance should be so constituted as to enable them in general to settle satisfactorily the issues of fact.

#### DELAY AND UNCERTAINTY IN THE ADMINISTRATION OF CRIMINAL JUSTICE.

In this respect a marked contrast exists between most of the American States and Great Britain and her colonies. If a capital felony is committed in England or Canada, and the felon is immediately apprehended, his execution under sentence of the law will generally take place, in the ordinary course of justice, within a period varying from two to four months from the commission of the crime. In some of the American States years intervene between the commission of a crime and the infliction of the punishment. In consequence of this long delay, the value of the punishment as a public example is in a great measure lost. A feeling sometimes springs up on the part of the people that, after suffering a long prosecution at the hands of the officers of the law, especially if the accused

has been in prison all the time, he has, perhaps, suffered enough ; and that, after such treatment, the additional infliction of the extreme penalty of the law is not punishment but cruelty. Perhaps this feeling has another source in the belief or hope that the character of the man meantime has changed, and that the punishment falls, not upon the old criminal, but upon a new and regenerated man.

The delay in the administration of criminal justice and the multiplication of new trials have ultimately the effect of defeating justice in many cases because witnesses die, or are scattered, or somehow get out of the way ; and new crimes, apparently more atrocious because more recent, produce new prosecutions, which take their places upon the calendars of the criminal courts, and seem to demand greater attention on the part of the prosecuting officer, so that every month of delay increases the chances of escape in the old cases. These delays are due to various causes, chief among which is the extreme technicality of the rules of criminal procedure, which too frequently result in the granting of new trials and the reversal of criminal judgments. These technical rules have been handed down to us from a time when the statute-books of our English ancestors were defiled with more than a hundred capital offenses ; when the accused was not allowed the benefit of counsel, except to argue questions of law in his behalf, and not then unless he had the wit to discover what questions of law were proper to be so argued. Arraigned, perhaps, for an offense the investigation of which involved a complication of facts and many distinct transactions, he was tried generally in a single day. The trial, too, often consisted in a process of the grossest abuse and brow-beating on the part of the counsel for the crown. The situation of the prisoner was so unhappy that humane judges invented a great variety of technicalities to assist him in escaping from the severe penalties denounced by the criminal statutes. As the substantive law of crimes became ameliorated, the reasons which had moved the judges to countenance these technical objections and escapes from the rigors of the law measurably passed away ; but the rules have, too many of them, remained.

In the State of Missouri, in 1877, a miscreant deliberately



shot and killed the wife of his employer and the unborn babe in her womb, because she refused to forsake her husband and become his mistress. He was four times tried for murder. His last trial resulted in a conviction and a capital sentence, but it went through the ordinary channels to the Supreme Court of the United States on a federal question, and was finally reversed, on a doubtful question of constitutional interpretation, by five of the judges, against four who dissented. In point of fact, taking together all the judges who had heard the case on the last trial and on the successive appeals, and considering their judgment upon the particular question of constitutional law, it appears that in this remarkable instance *five* judges overruled *thirteen*. Seven years had now elapsed since the commission of the crime. During the time this man had been the adviser, the strengthener, and the supporter of the criminal class in the jail. Ingenious and monstrous crimes had been committed by him, even while behind the bars of the prison. He was finally released upon bail, and was suffered to die in his bed like a decent Christian !

Instances of miscarriage of criminal justice are so frequent and have so shocked the sense of law-abiding people as to lead to a general feeling of want of confidence in the administration of criminal law, and of disrespect for those who are concerned in its administration. During the last twenty years this popular indignation has found expression in numerous lynchings—executions of accused persons at the hands of mobs—and these lynchings have become so frequent as to indicate the existence of a popular craze upon the subject ; and it has been said that at this time the number of persons accused of crime who are killed by armed mobs exceed in number those who are executed under the sentence of law. The remedy for these great evils lies in the improvement of public opinion so largely represented by juries, in the elevation of the bar, and in the strengthening of the bench. But it does seem that much could be done in the way of immediate amelioration, if the rules of appellate action in criminal cases were changed so as to require a full report of the evidence, taken by a stenographer employed by the State, to be sent to the appellate court in case of an appeal, and so as to prohibit



the appellate judges from reversing any criminal judgment, whenever, upon examination of the evidence so reported to them, they shall be of opinion that the jury has rightly decided the essential question of guilt or innocence. It is the monstrous practice of reversing righteous decisions, rendered in conformity with the overwhelming weight of evidence, upon grounds which are technical, and which do not touch the substantial merits, that outrages public opinion and leads to the results already stated.

Punishment, certain and swift, should be the fate of all who violate the penal laws. How to compass that end, and at the same time give a reasonable appeal, is the problem. And the problem is harder in capital cases, insomuch as "life is more than raiment" or liberty. In some States, Massachusetts for instance, two or three judges of the Supreme Court are required to sit in trials for offenses punishable with death. It certainly seems reasonable, in the present condition of the laws, that more than one judge should pass upon the legal questions arising upon trials, where a man's life may be the forfeit. Whenever imprisonment only may be the penalty, we see no sufficient reason why the imprisonment should not begin at once upon conviction and sentence, though an appeal be pending, for the presumption of guilt becomes so great when a jury has convicted and a judge has sentenced, that though a chance for reversal upon appeal may still be allowed, the execution of the sentence should not be stayed in the mean time. And where death may be the penalty, although, in favor of life, we would allow an appeal so long as there was a reasonable chance of reversal, we would nevertheless, upon a conviction and sentence, subject the convict to imprisonment at hard labor in the State prison while the appeal is undecided.

We recommend the adoption by the Association of the following resolution :

In all criminal trials of the grade of felony a verbatim report of the trial should be made by an official stenographer ; in case of appeal this report of the trial should be written out, and transmitted to the appellate court ; and the appellate court should be prohibited from reversing any judgment for

error of law, where the court, upon an examination of the testimony returned, should be of opinion that the verdict was clearly right.

#### LEGAL EDUCATION AND THE QUALIFICATIONS OF THE BENCH AND BAR.

The answers to our circular on this head represent, we suppose, the views of the legal profession generally, and leave little to be added by us. We insist that ours is a learned profession and not a trade, that it requires for its service high qualifications of character and learning, and that he who enters it pledges himself to do what he can, not only for the promotion of justice, but for the improvement of the laws. Because it is not a trade but a profession, preparations for it should be made with that view. A severe training is essential to useful service, and it is due to the courts and due to clients also that this training should be had, or at least much of it, before admission to the bar. There should be, in our opinion, a prescribed term of study, in a law-office and in a law-school, followed by a very strict examination in the different branches of the law, before any person is invested with the privileges and responsibilities of the profession. The Legislature, the courts, and the bar should all seek in their respective spheres to raise and maintain a high standard of learning and integrity for the profession, to which are confided interests so important to the well-being of the whole community.

#### THE JUDICIAL OFFICE.

The former report of this committee contained so much on the subject of the judicial office, that the Association will hardly care to hear more from us. The learning, integrity, and independence of the judges are matters of universal concern. How best to secure these ends is the problem. One class of thinkers advocates appointments by the executive, another advocates elections by the Legislature, another still elections by the people. We doubt whether a discussion here of the mode of selection would now answer a useful purpose; but we have no doubt that a majority of the profession, and

of the people also, believe that in many of the States the terms of office are too short and the salaries too small. The judicial office should be able to command the services of the most competent persons, and they should be made independent of parties so long as they remain judges. This can be done best by giving them assured terms so long as they do their duty, adequate salaries, and some provision on retirement from the bench.

#### CHAMPERTOUS ENGAGEMENTS OF ATTORNEYS.

Your committee believe that the administration of justice is corrupted by the practice on the part of members of the profession in some jurisdictions of prosecuting causes on contingent fees and buying in pending or prospective litigations. The right to appear as an attorney or counsel in the courts of justice is conceded by the State as an exclusive privilege to persons possessing certain qualifications. It is a franchise of great value, and is conferred upon condition, expressed or implied, that the person who receives it from the State will exercise it for the purpose of promoting justice and the improvement of the laws. His position is universally regarded as that of a *quasi* officer of the court, and it is hardly compatible with this relation that he should be a private speculator in litigation. The legal profession has been injured, its estimation lowered in the opinion of the people, and its influence diminished, by the sanction which in certain quarters it has given to these practices. In some States these practices are denounced by statute; in others the rule of the ancient common law, enforced by early English statutes, has been held to obtain; while in still others the courts have held that the position of a lawyer at the bar of the court is not incompatible with his being a secret partner in the litigation in which he is engaged. In truth, the prosecution of a cause on a contingent fee, or upon an understanding that the compensation of the attorney or counsel is to depend upon the favorable result of the litigation, is not under all circumstances to be condemned; for otherwise it might sometimes be impossible for persons having meritorious causes of action to command the aid of competent counsel. The prosecution of a cause by an



attorney on a contingent fee, unless he supports the litigation with his own money, is not unlawful maintenance, according to the definition of Blackstone or the general opinion of judicial tribunals in this country. The offense consists in prosecuting the suit of a client upon an agreement to have a part of the money or thing recovered for the services of the attorney, or the prosecution of a suit upon a contingent fee, the attorney agreeing to support the litigation at his own expense. We know that the administration of justice is in some jurisdictions scandalized by the practice on the part of attorneys of buying up or taking an interest in claims against wealthy persons or corporations and prosecuting them, with the view of inducing the defendant to agree to a compromise in order not to be harassed by litigation.

An efficient remedy for such abuses would probably be found in *publicity*. The theory of the administration of justice in American communities is that the courts are open, that the greatest publicity prevails, and that the record expresses the whole truth. But where the attorney or counselor who represents a suitor in a cause appears upon the record and stands before the court in his character of attorney or counsel merely, and nevertheless is at the same time a secret partner in the litigation, he does not disclose to the court his real attitude, which is that of a party as well as that of attorney or counsel; nor does the record, in describing him as attorney and counsel merely, express the whole truth. The ends of justice would probably be attained in every such instance, if the counsel for the plaintiff, or for the defendant where he is claiming affirmative relief from the plaintiff, were required to describe himself not only as attorney or counsel but also as interested in the claim, at the time of his first appearance in the case. The court could then better estimate the value of his acts and declarations in the various phases of the cause; and if he were to shed tears over the supposed wrongs of his clients, as champertous advocates have often been known to do, it would promote the ends of justice for the court and jury to know whether he were weeping from a real sense of the grievance to which his client had been subjected, or for an aliquot part of the judgment to be recovered.



Upon this question your committee recommend the following resolution :

Whenever an attorney or counsel has an interest in a claim or counter-claim in litigation, he must describe himself as so interested at the time of his first appearance in the case ; and if he fails to do so, and the fact of his interest is shown on the trial, the claim or counter-claim must be disallowed.

In closing, it may be proper to add that the undersigned concur in the several resolutions which the foregoing report recommends to the Association. They also concur in the general arguments made in support of these resolutions, without each being committed to all of the reasons given for the conclusions reached.

The several resolutions recommended are as follows :

I. The law itself should be reduced, so far as possible, to the form of a statute.

II. The greatest possible care should be exercised in the selection of jurors, much greater than is now exercised in most of the States. No person should be put upon the jury-list who is not known to be a person of probity, intelligence, and good repute. It should be borne in mind that a juror is in a very important sense a judge, though a temporary one, and something like the care required in the selection of permanent judges should be required in the selection of jurors.

III. A jury should not be called in civil cases unless demanded by one of the parties.

IV. It should be made the duty of the judge in every case, civil or criminal, to instruct the jury as to the law ; and it should be his right, in the exercise of a sound discretion, to advise them as to the facts, cautioning them at the same time that they are not bound by his opinion except as to matter of law.

V. The judge should not be required to reduce his instructions upon matter of law to writing, where a competent stenographer, appointed under a provision of law or selected by the parties, is present, by whom such instructions may be taken down as delivered.

VI. The trial court on a motion for new trial, or the appellate court on appeal upon a question of fact, should set aside a verdict where it plainly appears to be unsupported by substantial evidence of a credible character, or to be contrary to the weight of trustworthy evidence.

VII. The practice of submitting to juries special interrogatories upon the material or controlling facts in issue, and of disregarding their general verdict when inconsistent with their answers to such interrogatories, ought to be extended.

VIII. The law should provide for the settlement of the facts in the court of first instance, subject, perhaps, to one appeal, and the courts of first instance should be so constituted as to enable them in general to settle satisfactorily the issues of fact.

IX. In all criminal trials of the grade of felony a verbatim report of the trial should be made by an official stenographer; in case of appeal this report of the trial should be written out and transmitted to the appellate court, and the appellate court should be prohibited from reversing any judgment for error of law, where the court, upon an examination of the testimony returned, should be of opinion that the verdict was clearly right.

X. Whenever an attorney or counsel has an interest in a claim or counter-claim in litigation, he must describe himself as so interested at the time of his first appearance in the case; and if he fails to do so, and the fact of his interest is shown on the trial, the claim or counter-claim must be disallowed.

## REMARKS BEFORE THE AMERICAN BAR ASSOCIATION,

AUGUST 20, 1886.

MR. PRESIDENT AND GENTLEMEN OF THE ASSOCIATION: It will be difficult to compress within the limit of half an hour an answer to all the arguments and objections which we heard last night and have heard this morning against the resolution reported by the committee. Let me begin with adverting to the objectors. The first one was the gentleman from Pennsylvania, whose objection seemed to be that the common law in its present form was the perfection of reason. To him I have only to answer with the words of Lord Campbell in his life of Lord Mansfield, "He formed a very low, and, I am afraid, a very just estimate of the common law of England, which he was to administer." And again, "His plan seems to have been to avail himself, as often as opportunity admitted, of his ample stores of knowledge, acquired from his study of the Roman civil law and of the juridical writers, produced in modern times by France, Germany, Holland, and Italy." This is all I have to say to our friend from Pennsylvania.

The next gentleman was my friend from the District of Columbia—my active friend, my agile friend—who moved before the foot-lights as if he were not a member of the bar, and complained that my resolution would be a trap for him, not because it was bad in itself, but because I should infer from it something he did not like. A poor compliment that to his own ability and his own resources. If he would not assent to my proposition, until I explained what I inferred from it, he showed so little confidence in his own wisdom that I will take him at his word and leave him alone.

The next gentleman was a member of my own bar in New York—I refer to Mr. Turner—who spoke chiefly in condemnation of the civil code, which has been before the Legislature

of New York so long a time, and whose great objection appeared to be that I had introduced into it a section about nuisances which was intended to benefit the elevated railways, for which I was counsel. Let there be no mistake about this charge and the answer to it. He reiterated what had been stated many times before. The fact is, that the section he objects to expresses neither more nor less than the ancient law of the land, that it was reported, together with the whole code, in 1865, that I never saw or heard of an elevated railway until many years afterward, and that my first connection with one was as late as 1877. Bear with me, then, as I pronounce the charge shameful, and hold it up, as I mean ever to do, for a sample of the unjust criticisms with which the code has been assailed. Do you not agree with me now, that I have no occasion to pursue Mr. Turner further?

The next gentleman was Mr. Nash, who has rarely been here before. At least, I do not remember to have seen him here. He had to say that this resolution was not germane to the inquiry referred to the committee, because the discussion of a code, which would, as we say, simplify the law and smooth the path of justice for the people as well as the judges and lawyers, was no part of the business of this Association, and was not within the scope of an inquiry as to what can be done to lessen the delay of judicial administration. He forgot that the resolution contained the word "uncertainty" as well as "delay." I may pass him by.

Next were two gentlemen of Massachusetts, whom I have not the honor of knowing personally, though I should be glad to know them, and their argument was against any codification whatever. Now, I do not know the age of these gentlemen, but I do know that much of the agitation we have had about codes had its origin in Massachusetts, and that the authors were Joseph Story, Theron Metcalf, Simon Greenleaf, Charles E. Forbes, and Luther Cushing, lawyers and judges of that State, who, probably before these gentlemen were born, reported that it was not only practicable but expedient to make a code of the common laws of Massachusetts. And it is a remarkable instance, Mr. President, of the evanescence of fame, of the suddenness with which repu-



tation disappears, that these great names should so soon pass into oblivion in their own Commonwealth and at their own bar.

The last speaker whom I need to mention was my friend Mr. Benedict, for whom I have much respect, a respect for him and for his name, for I have long known his family. He made this most extraordinary argument: Your New York code of civil procedure has proved to be a source of litigation. Grant it. Who made it so? New York lawyers. As the code of procedure stood from 1848 to 1877, it was a simple well-known system, which everybody understood, and which nobody wished to change, except a few persons who got up a commission to revise the statutes, and they set to work to change the code against the remonstrances of its friends, by the aid subsequently obtained of the New York City Bar Association and its adherents throughout the State. These are they who palmed off upon us a work, which they called a revision, of which they are now loath to bear the burden. I warned them of the consequences then, and I tell them now that they will never have the civil procedure of New York, as it should be, until they go back to the code of 1876, and complete it according to the design of its authors.

Now, proceeding to the question before the Association, I beg you to observe the form of it, which is whether the resolution that the law itself should be reduced so far as possible to the form of a statute should be adopted. My friend Mr. Abbott, an eminent writer, whose opinion I regard with great respect, suggests this amendment, to strike out the words "so far as possible," and substitute "so far as its substantive principles are settled," so that the resolution will read, "that the law itself should be reduced, so far as its substantive principles are settled, to the form of a statute." I have not the least objection to this amendment. The two forms mean, in my view, the same thing. What do we mean? The resolution does not affirm that we must have a code. I think we must, and I think that the adoption of this resolution will logically lead to a code, because it will be found, when you follow up the proposition, that it is possible to reduce a great many of the branches of law, if not of all, to the form of a statute.

That would be a general code. This conclusion presents, however, another question. I prefer to take one thing at a time, and I put it to you as reasonable men whether you should not first adopt the abstract proposition that you prefer written to unwritten law. There are only two modes of expressing law now. One we call unwritten, because it is not written in the statutes, but rests only in the reports. The other we call written, because it is written in the statutes, and thus we say reduced to a statute. The question is, whether the laws made for the people should be understood by the people. Do not blink at that question, for you are to decide it. Let me tell you that the bar of this country is itself on trial before sixty millions of people. You are only seventy thousand in all the States, and although you are a great and powerful body, as I rejoice to know, because I am one of you and share my fate with you, yet I think that the bar will be as a drop in the stream against the tide of public opinion. Do you suppose that the people will allow you to make laws for them without knowing what those laws are? How long do you think such a condition of things will last?

I say, moreover, that the law should be written, because it is natural to write what we would make clear and precise. The chairman ruled yesterday, when a member offered an amendment, that it must be sent up in writing. Why? Why not leave the amendment to the recollection of the proposer and of the members? Because you would have it certain. When you enter into a contract, do you leave it to memory? Do you not reduce it to writing? The greatest facts in the history of English and American jurisprudence have been written down. Magna Charta was put into writing, Burke says, for the purpose of defining by positive written law the privileges of the people of England. The law of libel was reformed by act of Parliament. In this country we have moved in the same way. We made a written Constitution. Was that a mistake? We had a dispute with England about the Alabama. What was it for? It was about the depredations of that vessel, and the question was whether or not England was responsible for them. Was not that a question to be settled by international law? Certainly. Why, then, did not the

administration of President Grant send counsel to Geneva to argue the question upon the common law of nations? No, said our Government, the rules of law by which the tribunal is to judge must be written down first. They were written down, and then the tribunal was established. During the war the President issued a proclamation emancipating the slaves. That raised a great question of public law, whether a commander in the field could emancipate the slaves of his enemy. The question would have led to interminable conflicts and debates; and so, said the American people, "we will write the freedom of the slave in plain English," and they did write it and put it into their Constitution, where it will stand forever. Now, Mr. President and gentlemen, this was doing what I insist that we shall do, that is, write down our rights and our duties whenever we can. The resolution does not say do it now, but whenever it can be done. Would you have your rights and your duties determined by tradition, by inference, by the fleeting opinions of men? No; you wish them formulated and put in writing, whenever it is possible, so that all men may read; and that is exactly what this resolution calls for.

Now, Mr. President and gentlemen, I have spoken half of my time. I did not intend to say a word about codification. I intended to confine myself and to urge you to confine yourselves to this resolution alone, which is, that so far as we can we will place the laws of the land in plain language, accessible to all the people and understandable by all the people.

"Oh," said a gentleman, "you intend to have a code?" Well, if they mean that I intend it, there is no doubt of it. But many others may not intend it, and I would not have a debate with them now on that subject. Let us take one thing at a time. Pass this resolution, and then let us consider, in our several States, whether this rule of law or that rule of law can be put into a statutory form.

As to the expediency of a code. I have to ask what you mean by a code? We do not mean by it a book which shall contain within its covers all the rules of law which are to govern all the transactions of men in all future time. Nobody but an idiot supposes that. We mean by a code a condensed and



classified collection of the general rules of law, settled or that should be settled, on a given subject or class of subjects. That is all. We can have a code of real property law. Your honored father, Mr. President, was member of a commission which deserved great honor for being the first in an English-speaking community to formulate the law of real property. They made an almost complete code of it, and when we, the code commission of a later time, sat down to finish what they had begun, we had only to add a few sections.

Gentlemen have much to say about the statute of frauds. Do you not see, they say, that there are three volumes of comments on that statute alone? I retort by asking, would you repeal it? Did not a Chancellor of England declare that every line of it was worth a subsidy? And yet that statute is referred to by these anti-codifiers as an awful example of the folly of writing a law! What do you say of the Constitution of the United States? That is a code. Would you abrogate it? We do not forget that human language is susceptible of different interpretations; but we say that putting a law in writing gives a greater assurance of its being correct and precise. We do not say that it will prevent all possible misconstruction.

The argument for a code rests on authority, on experience, and on reason. It is reasonable that law should be written. The law was put into writing on Mount Sinai. The two tables of stone were a code. Suppose some of my associates of the New York City Bar Association were dealing with them; would they not exclaim, "How badly written they are! We will refer them to a committee for amendment." "Thou shalt not bear false witness against thy neighbor." Why against your neighbor? Do you mean that you may bear false witness against everybody else except your neighbor? There is not one of these commandments that our objectors would not riddle through and through. Later ages have produced the code of Justinian, the Code Napoleon, and the codes of Continental Europe. But, say our objectors, the Anglo-Saxon race is different from other races; no people that had the vitality of the Anglo-Saxon ever made a code. What do you say of the vitality of our friends of Louisiana? Is it that because they are partly French and partly Spanish, with a great admixture



of English and American, therefore they can bear a code, whereas the sturdy Anglo-Saxon can not? Is that the argument? What follies impose themselves on mankind! When you have a particularly silly argument, the true way to answer it is that which Napoleon adopted,—“Bah!” I do not say that anything has been said here which deserves this answer, but I have heard much outside which deserves nothing else. Because a nation is Anglo-Saxon it can not have a code! Its vitality is too great for that, or a code will weaken its vitality! Was France made weaker because she had a code? Is Germany the more feeble because she has codes? Has she not rather risen to the height of power and dominated over central Europe? Is California feebler than Nevada, or feebler than New Jersey? We have in New York a penal code and a code of criminal procedure, and we have not waned because of them. They were opposed by the very men who come here from the City Bar Association to oppose our resolution. These men passed a string of resolutions in their Association, declaring that the penal code was an invasion of the rights of the citizen, and they called it very hard names. What then? It was passed, nevertheless, and in two years afterward I sent a circular to every Supreme Court judge, every county court judge, and every district attorney of the State, inquiring how it worked. I received many replies, but not one that did not commend its working, and some added that they did not see how they had got along without it.

Now, as to the authority of names. Whom have we on our side? First of all Mr. Justice Miller, of the United States Supreme Court, who declares himself in favor of codification, and recommends a code of Federal procedure—a bill for which has been already introduced into the United States Senate. We have Story and his associates, and Walworth and a host of others.

Why can not we lawyers rise to the height of our profession, and feel ourselves bound to improve the law of the land and to do everything in our power to make it plainer, cheaper, and easier for the people? The majority of lawyers appear to care nothing about it. In this Association, numbering over seven hundred members, we sent out circulars asking their

opinions upon the questions stated in our report. How many answers do you think we received? Between forty and fifty! In our State Bar Association, at the suggestion of the Governor, we sought the opinions of the members upon the proposed civil code, and to that end sent a circular to each of them—about three hundred—asking their opinion, and we received answers from between twenty and thirty, and no more. But I am glad to say that of these every one who admitted that he was in favor of codification as contemplated by the Constitution, and had read the code, declared that he was in favor of its enactment.

What is the reason of the indifference of lawyers to the reform of the law? The truth must be told. Too many of our calling look upon it not as a profession but as a craft. And it is because they so regard it that they do not strive to elevate it. The majority of the bar of this country have hitherto opposed every great legal reform. I challenge the student of history to find any important law reform in our times advanced by the great body of lawyers! Every such reform has been carried by the people with the aid of a minority of lawyers. Take heed in time. You of the majority opposed the abolition of imprisonment for debt. You opposed giving woman her rights. You have opposed every attempt at codification, and it will be so always until you arrive at a better sense of the dignity and the duty of the profession. Profession I call it, and not a craft. We belong to a learned and noble profession, which has held in its ranks some of the greatest men of all time from Cicero to Bacon, from Bacon to Mansfield, from Marshall and Story to the great judges and lawyers of our day. Let us show ourselves worthy of them! Let us act as becomes their brethren, and do all we can to elevate this profession, which is our pride and boast, and make it a means of beneficence to all the people of the land.

## CODIFICATION.

Article in the "American Law Review," January-February, 1886.

THE editor of the "American Law Review" asks me to contribute to a discussion of codification. It seems to me that the discussion has been had already. What we need is to get it attended to. The people have an idea that something is wanting to the administration of justice, but they do not clearly see where the defect lies. Indeed, they are not likely to see it. It would be very strange if they did. The knowledge of the law is confined to a particular class; it is the interest of that class that it should be so confined; they keep the law scattered through thousands of books, where nobody can find it but themselves; they say to the people that from its very nature it must be so scattered; and they have had such influence with the people as to make most of them believe it.

This condition of things will last forever, unless the people take the matter into their own hands. The lawyers as a body never did begin a reform of the law, and, judging from experience, they never will. The reform must be the work of laymen, aided by a minority of lawyers.

As for me, I have written and spoken so much about it, in the last seven and forty years, that I have well-nigh exhausted myself—I can do little more than pick up odds and ends. These, however, you may have, if you think they will do any good.

What do we mean by codification? Not that which many lawyers imagine it to be. They conjure up a phantom, and then proceed to curse and fight it. Their imaginations portray it as a body of enactments governing and intended to govern every transaction in human affairs, present and future, seen and unforeseen, universal, unchangeable, and exclusive.

That is not our meaning. We mean by codification what Judge Story meant fifty years ago, when he declared it to be practicable and expedient—that is to say, the reduction to a positive code of those general principles of the common law, and of the expansions, exceptions, qualifications, and minor deductions, which have already, by judicial decisions or otherwise, been ingrafted on them, and are now capable of a distinct enumeration.

This is repeated in Professor Koenig's letter, reprinted in the present number of the "Law Review." You will there see what we advocates of codification mean, when we use the word. Let us, then, waste neither word nor thought on questions outside, but confine both to this one only—whether such a codification is practicable and expedient.

I will mention here four *reasons* for codification, and four *sophisms* against it:

*First.* There are certain propositions which have become maxims of government, one of which is that the legislative and judicial departments should be kept distinct, or, in other words, that the same person should not be both lawgiver and judge. There is no need of arguing about it. The maxim is founded on philosophy and experience. It has taken ages of struggle to establish it. And here it is. We profess to take it for absolute truth; we talk of it as one of the fundamental doctrines of modern government; we write it at the head of our Constitutions; but we violate it every hour that we allow the judges to participate in the making of the laws.

*Second.* Another of these maxims is, that they who are required to obey the laws should all have the opportunity of knowing what they are. These laws are now in sealed books, and the lawyers object to the opening of these books. They can be opened by codification and only by codification. Do not say that this is a figurative expression which proves nothing. It proves everything. The law with us is a sealed book to the masses; it is a sealed book to all but the lawyers; and it is but partly opened even as to them. It is an insult to our understanding to say that the knowledge of the law is open to everybody.



It should be open. That none can deny who has common understanding and a decent regard for truth. How can it be opened? In one way, and one only: writing it in a book of such dimensions and in such language that all can read and comprehend it. What if lawyers should say unwritten law is good enough for them? They are used to delving in it; they like it; they live by it. What then? Supposing it to be so does not mend the matter, unless it be assumed that the law is made for the lawyers and not for the people.

These two reasons for codification should of themselves be decisive.

*Third.* Another and a third reason is the lawyer's own experience; the experience, I might say, of every lawyer. What does he do when a case is brought to him, for the courts or for his private opinion? The first question he asks himself is: Has the point been decided? He looks for a decision. Where does he look? First in the volumes of his own State reports. It may be that he finds a case just decided in the highest court on all-fours with his own, and he fancies that he may rely on that. Can he? We lawyers know that there is still a chance of mistake. Look at the list of "cases cited, criticised, distinguished, or overruled." This is the very best aspect of the lawyer's position in the case supposed. But what if there be no such decision? Then he looks into the decisions of inferior courts in his own State. If he finds one that he thinks is applicable, he ventures to take it, though with less confidence, because he knows that he is to go through the ordeal of the higher court, and his chances there are uncertain. Should he happen to find no decision at home applicable to his purpose, he goes abroad into other States or across the sea. Now that he has got beyond the hundreds of volumes of his own State he resorts to the thousands of volumes of other States and countries. What "a codeless myriad of precedents" to look through! What "a wilderness of single instances" to explore? Consider the nature of the search, and what is found, after all? He peers into volumes upon volumes, with no other guide than an index at the end of each volume, or a compilation or collection of indexes called digests, of many volumes. These are made sometimes by men

of sense, and sometimes by men of no sense, without any agreement upon a plan or classification of subjects. The result is, as might have been expected, that the lawyer, with an earnest desire to get the "best opinion" or the "weight of opinion," has, after all, to make a guess. Now, if he had been asked at the outset whether he would not prefer to look for an authoritative statement of the rule for his case in a statute-book, *if he could find it there*, he would have answered yes.

*Fourth.* The fourth reason that I will mention is that no people, which has once exchanged an unwritten for a written law, has ever turned back. One might as well expect the sun to return upon the dial. Even where the written law has been imposed upon a conquered people, to whom it must have been at first distasteful for that reason, it has held its place after the foreign domination has departed. The eagles of Napoleon were driven back across the Rhine, but the code which went forward with the eagles did not return with them; it remains there to-day. These facts are arguments worth all the theories in the world. Scholars may write as many treatises as they will; the experience of mankind is worth all the books that were ever written. You can not explain away this experience; you can not reason it down; it proves the superiority, beyond dispute or cavil, of written to unwritten law, of statute law to case law, or, as it might be better called, to guess-law.

Now for the sophisms against codification:

*First.* It is said that the law will be "cabined, cribbed, confined," if it be written. Of all false reasoning, if reasoning it may be called, this seems to be the weakest. It assumes that it is better to have the law uncertain than to have it certain. But surely he who is to obey the law ought to have the means of knowing what it is. If the written law is elastic, as is sometimes said, or flexible, as said at other times, that means that it is not certain; and that is just the thing to be condemned and avoided. Another form of the objection is that a code is a cast-iron frame unfitted for a growing body. The same might be said of the dictionary. Language is one of the most flexible of instruments; it grows with the growth of a people; new words, bearing their thoughts, "winged words,"

are born every day; yet nobody thinks that a reason why a dictionary should not be made, placed in every house, and consulted by all its inmates.

*Second.* A second sophism is that a perfect code can not be made, and therefore, inasmuch as none but an imperfect one is possible, there had better be none at all; which is as much as to say, you can not have all you want, therefore you shall have nothing. Apply this rule to any statute, old or new, or to any constitution of government, and see to what consequences it leads. No code can provide for all future cases. So it is argued, you should not provide for any; which is about as reasonable as it would be to argue, because you can not provide for all the wants of a people, you should not provide for any.

*Third.* A third sophism is this one: We have grown strong and prosperous without a code, why get one now? What need is there of a change? Yes, we got on very well without steamers, railways, or telegraphs, a century ago; we built up cities; we founded States; we sent forth armies and navies; we made and administered a great many good laws. But what have inventors and legislators been doing in these hundred years? Are their works not worth having?

*Fourth.* A fourth sophism is, that Legislatures are always at work changing the laws, and therefore if a code is made it will be subject to continual change, and so it is better to have none of it. Compare, then, the changes in legislation with changes in decision, measure the fluctuations of the law of the lawgiver with the law of the judge; the sixteen thousand decisions of the courts of this country in a single year, with the statutes enacted by the Legislature of any State, or of all the States together.

These four reasons and four sophisms are examples of others—many others, I might say. There is nothing in the name of code to frighten anybody. We are used to it. There is a code of rules for this society and for that; for the Produce Exchange, the Stock Exchange and other exchanges; the doctors have a code for their practitioners; there is a bankers' code and an education code; there is a code of signals for the sea, and there is even a code for telegraphic messages. It would



be hard if, with all these codes, we could not have a code of laws.

How can a code be made? Just as other things are made, which require unity of design. The Legislature is, of course, to enact it, but it must have been prepared beforehand by competent persons. This does not detract in the least from the functions of the legislator. The plan must be the work of a commission; the sanction, the work of the legislator. If the Legislature of a State wants a new Capitol, it does not make the plans, drawings, and specifications itself; it employs the best architects it can, and then it accepts the work of the architects, and gives its sanction to the building.

Some lawyers who favor codification want it done by committees composed of experts in the different branches of law. It would be just as rational to stipulate, in the building of a Capitol, that one architect should have the building of one wing, another architect another wing, and still another the center!

Again, it is said, let the work be done in parts, or piecemeal. The objection to this is, that there are rules common to all the parts, and, if the work is done in parts, these must be repeated in each of them. Take the few instances in which the English have codified parts of their laws; the Bills of Exchange Act being one, and the Factors' Act another, how would they look side by side within the cover of a book labeled "Code Victoria"?

Perhaps I may be expected to say something about codification in the State of New York, the pioneer Commonwealth in the work of law reform, though, I am sorry to say, it has paused in mid-career. We have had here as earnest a contention as was ever had over any work. Of the five codes prepared, three have become laws. The Political Code need not be brought into the discussion, for it is chiefly a compilation of existing statutes, relating to the government of the State and the functions of its public officers. The Civil Code, the most important of all, has been once rejected by the Assembly, and twice passed by both Assembly and Senate, but failed to receive the approval of the Governors. The onslaughts that have been made upon it, the falsehoods that have



been told respecting it, the means that have been resorted to for its defeat, would form a chapter of legal history which I hope yet to see written, amusing and instructive, for the information of the world, touching the devious ways of prejudice and ignorance. It has been objected that the code is too long and that it is too short; that it has too many new phrases, and too many old ones; that it changes the law, and does not change it; and so on to the end of the score of contradictory objections. One of them only will I take the present occasion to mention—its length, compared with the most renowned of modern codes. The French Civil Code has 2,281 articles, and the French Commercial Code 648, making altogether 2,929. Deducting 750, which relate to subjects treated elsewhere in the New York system, we have left 2,179. The New York Civil Code has 2,028 sections. Taking particular subjects for comparison, we find that in the French code negotiable instruments have 80 articles, and in the New York code 117; that property real and personal has in the French code 585, and in the New York code 511; and that all the French codes together have 5,098 articles, and all the New York codes 7,170.

Address before the Law Academy of Philadelphia, April 15, 1886.

MR. PRESIDENT AND GENTLEMEN: A New York lawyer who speaks in the presence of his brethren of Pennsylvania must take heed to his words. Before any of us were born the wit of the "Philadelphia lawyer" had become a proverb. It was supposed that he could interpret any writing, the most obscure, though it were the handwriting on the wall. But he was, of course, too considerate and too just not to hear all that could be said before he decided, and in this faith I am here to speak to the Law Academy of Philadelphia and their friends and members of the bar.

I do not feel myself to be altogether a stranger. The names of Hopkinson, Binney, Sargent, Wharton, and Rawle, are hardly less familiar to us than they are to you. The fame of your judges is equal to the reputation of your bar. The

great name of Gibson stands by the side of Marshall and Kent, Shaw and Story.

An address on codification befits especially an association of lawyers, for two reasons: one, that the study of the law is their study; and the other, that it is their duty, beyond that of other men, to promote the improvement of the law, inso-much as their opportunities are greater, and their privileges are a compensation in advance for all the pains they can be put to. *Homo sum; nihil humani a me alienum puto*, was Terence's exclamation, which aroused to enthusiasm the commons of Rome. Why should not every one of us say with equal emphasis and pride, I am a lawyer and nothing that concerns the law is foreign to my studies and my purposes?

A code is a comprehensive statute purporting to embody the rules of law on a given subject. It may be more or less general, it may be well or ill expressed, it may be conveniently or inconveniently arranged; the theory is nevertheless the same—the bringing together and placing in order the precepts which are for the government of the people. Collection and arrangement are the essential ideas; the rest are incidental. The manner of arrangement is a question of convenience as of science. The more perfect the analysis, the more close the condensation and the more distinct the propositions, the better is the whole work. There may be one subject or any number of related subjects. Thus, the English act passed in August, 1882, “to codify the law relating to bills of exchange, checks, and promissory notes,” is a small code, containing the law on those subjects. The first three chapters of the second part of the Revised Statutes of New York, contain a nearly complete code of the law of real property; the Penal Code of New York is a complete code of the law of crimes and punishments; the Civil Code and Code of Commerce of France make together a complete code of the French law of property, personal rights and obligations; the codes of California, political, civil, penal, and procedure, are complete codes of the different branches of the law of the Golden State.

When I advocate codification, I beg not to be understood

as claiming that it is a panacea for all the ills which afflict judicial and forensic life. Under any code, though it were made by archangels, language would sometimes be susceptible of different interpretations, judges would at times incline one way and at times another, lawyers would still reason on both sides, and suitors would be often mistaken, now and then dull and now and then dishonest. But if we can not expect perfection, we can at least strive for improvement.

The first question that presents itself is this one: Is codification to any extent feasible? and the second this other, to what extent is it so? On these two questions the controversy depends.

Our law, as we all know, consists of two portions, which we call statute and common. This common law is not the same everywhere; there is a common law of England, a common law of Massachusetts, and a common law of Pennsylvania, and these differ from one another in important particulars. Sometimes we distinguish the two portions by calling them written and unwritten, or sometimes enacted law and judge-made law. To say that one is written and the other unwritten gives no idea of the distinction between them; for, whatever it may have been in the mother-country or in past ages, it is now, in point of fact, all written. There may have been days long ago when writing was so uncommon that no laws were written, except acts of Parliament, and other law, if law there was, falling from the lips of judges, and taken thence was committed to memory and descended by tradition. Those days and all their people passed away centuries ago; the days were rude and the people illiterate. But words are often things, and their misuse has led to much misunderstanding and to half the false reasoning there is in the world. Judge-made law is an expression offensive to some persons; there is no such thing still existing as unwritten law; and customary law has vanished, if it ever came to the New World. The proper expression by which to designate our two kinds of present law, that which gives the true distinction between them, is that one is the law of statutes and the other the law of precedents.



Now, all will admit that the statute law can be codified. The statutes are full of enactments affirming or changing rules of the common law. Frequent revisions of the statutes in the different States are so many proofs of the practicability and expediency of such a codification. Most of the States have them. The objects are generally the same as those expressed by the Legislature of Massachusetts in ordering their last revision, which were "for consolidating and arranging the general statutes of the Commonwealth, with power to omit redundant enactments and those which may have ceased to have any effect or influence on existing rights; to reject superfluous words, and condense, into as concise and comprehensive form as is consistent with a full and clear expression of the will of the Legislature, all circuitous, tautological, and ambiguous phraseology; to suggest any mistakes, omissions, inconsistencies, and imperfections which may appear in the laws to be consolidated and arranged, and the manner in which they may be corrected, supplied, and amended." In Pennsylvania there is, I believe, no statutory revision, but there is instead a private compilation, "Purdon's Digest," which is generally accepted. The preface to the latest edition of this work calls it an "alphabetical arrangement of the laws of Pennsylvania," and the editor, Mr. Brightly, states that he "was actuated by the conviction that what the practitioner requires is a complete analytical view of the law on any given subject, presented to the eye in continuous connection."

Let us pass, then, to the law of precedents, or that part of it not already codified, and give our attention to that alone for the rest of this address. Is the codification of the law of precedents, or any part of it, feasible, and if feasible is it also desirable?

I venture to affirm that it is both.

First, can any part of it be codified? I think all lawyers will agree that some of it can; at least I have never heard any one affirm that it can not. Let me show how the English Bills of Exchange Act was framed by reading this account of it from an address of Judge Chalmers, the author of the bill. These are his words:

"That was the process I went through in drawing the



Bills of Exchange bill. There were about seventeen statutes relating to bills and notes, and about 2,000 English decisions to go through. After that I looked into an American book, namely, 'Daniell on Negotiable Instruments,' and found no less than 7,000 decisions cited. Of course, I only had to refer to the American decisions for information on doubtful points. I read carefully through the whole of the English decisions on drawing the general proposals, and I think the result of the act is that it substitutes the language of the Legislature, comprised in one hundred sections, for about 1,600 decisions and seventeen statutes. I think that, if every branch of the law were taken in hand and dealt with in the same way, the result would be similar. I have not worked out the percentage, but I should think you would get the law stated in about one five-thousandth part of the space in which it was formerly stated, and all in one book, and in one place, instead of being scattered about, as it is now, like stones on the seashore."

Let us pause a moment to consider the significance of the statement here made by Judge Chalmers, whose authority gives him a right to be heard and heeded, since he was the framer of the only codifying bill that has ever passed the British Parliament—the statement, I mean, that "if every branch of the law were taken in hand and dealt with in the same way," the English people would "get the law stated in about one five-thousandth part of the space in which it was formerly stated, and all in one book and in one place." Would you not be glad, young gentlemen, you who are studying the laws of Pennsylvania, if you thought that those laws could be reduced to one five-thousandth part of the space they now occupy, and all in one book and in one place? And if I might address myself separately to the lawyers of Pennsylvania now practicing before her courts, and to the judges who dispense her justice, I would ask them whether they would not hail the dawn of that morning which should reveal to them the multitudinous books of their laws reduced to "one five-thousandth part of the space they now occupy, and all in one book and in one place"? Should there still be doubters whether anything so like a miracle could ever be seen in the fair Common-

wealth which the grand old Quaker of Charles II's time founded in the wilderness on the basis of the law of love, I would ask the doubters whether it be not worth their while to study the history and the effect of this little English code, which, framed by the judge whose words I have quoted, was carried through the House of Commons by the present Lord Chancellor of England?

However that may be, it is made certain by this English experience—and there are some who think, as I do not, that English is better than American experience—it is, I say, made certain by the former, if there were none other, that some portions of the law of precedents can be well and usefully codified.

How much further can the codification be carried? When a year ago the London Chamber of Commerce went to the Chancellor of England to ask for a codification of commercial law, did those London merchants ask more than they were entitled to? Are there any lawyers who will affirm that they did? And if they did not, pray tell us what part of the law is harder to codify than that which is called commercial?

My proposition is that a general codification of the law is both feasible and desirable. Not that I think it possible to solve all problems or answer all questions that may arise hereafter. Who can tell what may yet happen? There may be new developments of property, new social relations, new phases of personal rights. The marvels of this generation may be supplanted by greater marvels in the next. We can look a little way before us, and we know also that certain principles are eternal. But there we stop, and must stop. The best code that the wisdom of men could devise would not make the way plain for the decision of all questions in all time to come. So long as our vision is limited to the actual and the present, we must be content to look only for that which can be foreseen. Our knowledge is derived from experience, and when we seek to provide for new experiences we reason from the past and the present to the future, declare the law of what has been and now is, say that it shall continue to apply to the same experiences, in the same circumstances, affirm those general principles which are unchangeable and immortal, and leave the rest to the incoming ages.

But it is said that there are certain portions of the law of precedents that can not be expressed in language. Is not this a contradiction in terms? The law of precedents implies that there are precedents, and they are of course couched in words. If these words mean anything, the meaning can be expressed; if they mean nothing, the precedents are of no import. The law is a rule for the guidance of men; when a precedent expresses or implies such a rule, it can be written; if it can not be written, it is neither rule nor precedent. Yet law is a rule for human conduct; it can not be that, unless it be known. To require men to follow a rule when they do not know what it is, would be as much as to say it is no rule to them at all.

Suppose the members of this well-equipped academy were to take for a thesis one of the most important decisions upon your common law, and formulate the rule of law there discussed and applied. If you can do it, the rule so formulated can stand in a code; if you can not formulate it, the case is valueless as authority for any future case.

Perhaps I dwell too long on the objection that the common law is inexpressible and inscrutable; but I have heard it uttered so often, and so often assumed though unuttered, that I suppose it yet lingers in the minds of many who should think more and reason better.

Akin to this objection is that other that the judges do not make but only declare the common law. Who made this common law, if the judges did not? Your Legislature did not make it. The notion that it is the remnant, floated down to us from old acts of an English Parliament, has as much reason to support it as Coke's theory that the law of legal descent is derived from the law of material gravitation. Whatever of common law there is in this country is the law of precedents. These precedents are the common law, the unwritten law, made by the judges, and constitute the judge-made law of our day.

Austin treated this notion with the scorn and ridicule which are its due. He said, writing of Blackstone: "What hindered him from seeing this was a childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I

suppose, from eternity, and merely declared from time to time by the judges?"

Let us for our part discard this imaginary law, this law of unutterable thoughts, this miserable phantom, and turn it over to those erring disciples, who are willing to parade in the soiled and tattered garments of a defunct superstition.

I know very well that most lawyers, when first questioned, will answer that the common law can not be codified. They say that it is too flexible, too elastic, too expansive; they never say that it is too uncertain, for that would be to expose the weakness of the objection; but they express their view in some such phrase as this: The common law is like the air we breathe, it is a subtile element, invisible, all-pervading, essential to life, yet unconfined and incompressible. These are their set phrases, drunk in with the milk of their *alma mater*. You could not expect them to be different any more than you could expect a Mohammedan, fresh from his Meccan pilgrimage, to look with favor upon the temples of Christian cities. No, says the unbeliever, the common law can not be codified, and he says it with emphasis increasing in intensity with every contradiction and every dissent. But saying that a thing can not be done is no proof that it can not. The boldest asseveration is nothing but words, and the loudest in sound is generally the weakest in sense. The positiveness signifies nothing but the hardness of the unbelief. I remember reading at Liverpool in 1837, on the eve of a sailing-voyage to New York, a learned article by one of the lights of science, written to prove—and proving to his own satisfaction and the satisfaction, doubtless, of hosts of readers—that steaming across the sea was not possible. My long voyage home through winds and calms had hardly ended, when a ship from the Old World came steaming into the harbor of my own island city!

I remember, too, that a learned professor of a great institution, so late as 1866, in a tone half of pity and half of derision, scouted the idea that a telegraph could ever be stretched beneath the Atlantic. A year did not elapse before the same gentleman had the satisfaction of reading in his morning paper news sent under the sea of the last day's doings in the capitals and camps of Europe. Be not afraid of any prophecy



of failure, however loudly spoken, and by whatever names supported. Not possible to form a code of American common law! Are we inferior to Frenchmen, Germans, or Italians? Or will it be said that what was possible with Roman and feudal law is not possible with the Anglo-American, which is, after all, but a mixture of the other two? But why reason about it further, since the experiment has been tried, and the trial has succeeded, or rather since the attempt has ceased to be experiment and has become fact? Still, if there be any who will persist in thinking that there are some departments of law which can not be reached, to them let us answer that "sufficient unto the day is the evil thereof"; let us advance as far as we can, and stop only when we reach an insuperable barrier, like the thick-ribbed ice which guards the poles.

Assuming now that codification is feasible, is it also desirable? Desirable for whom? For the whole people, I think—the whole people, including lawyers and judges as well. Why is it desirable for the people? Because the law is made for them; it is the measure of their rights and duties, the guide of their daily lives. They are bound to know the law, it is said. Ignorance is no excuse. They are to do what it commands; they are to avoid what it forbids. How are their obligations to be fulfilled, if they are kept in ignorance of what those obligations are? If, therefore, it could be shown that a code would be of no service to the bench or the bar, it would nevertheless be beneficial to the people, and that is a sufficient reason for having it.

So long as the law of precedents remains in the repositories where it now lies, it can not be much known to the great body of citizens; how little of it is known to them, or rather how imperfectly any of it is known, is shown by the number of lawyers whose lives are passed in explaining it, or discussing it for them in the courts. There are in the United States, it is supposed, 70,000 lawyers for 55,000,000 people; in France, according to the best information I can get, there are 6,000 lawyers for 40,000,000 people; in the German Empire there are 5,000 for 41,000,000. The disproportion between their relative numbers and ours is a subject which political and legal students may examine with profit.

Knowledge of the law is, or should be, a part of the education especially of an American citizen. He participates in the government of his country more directly and more frequently than any other citizen in the world, except, perhaps, an inhabitant of the Swiss cantons. His rights and his duties under the law are of more interest to him than to any one else. This is the reason which prompted the Governor of New York to recommend, in his message of last year, the placing of the penal code in every school district of the State. The amendment of the laws is easier and safer when they are brought into juxtaposition, and the relations of the different parts to one another can be seen by a general survey. This has been our experience in New York, where some harsh features of our penal laws were softened so soon as they were placed conspicuously before the eyes of all in a penal code, accessible and intelligible to all. For the sake, then, of giving to the people information of their rights and duties under the law, enabling them the better to perform the obligations of citizenship, and placing before them the body of their laws, that they may the better see wherein they are oppressive, or superfluous or defective, I submit again that a code of every part of the law is desirable for the people.

Now, it is said, I know, that even if the law of precedents could be expressed in language, it ought not to be so expressed, because it thereby becomes unchangeable, or, to use the politer phrase, less elastic. The elasticity of this law is said to be its chief advantage, its element of beneficence, its admirable distinction. It does not take a "Philadelphia lawyer" to detect the fallacy of this contention. A changeable law is no law at all. You may call it what else you please, but it is not a rule for the guidance of intelligent beings who wish to make their conduct square with the laws of the land.

It is further objected that a code would hinder the growth of the law. Does a dictionary hinder the growth of language? Does it not rather help, by making the growth more symmetrical? The relation of the dictionary to language is not very unlike the relation of a code to the law. But what is here meant by growth? A growth in animals and plants means expansion without destroying identity. But a new rule of

law added to an old one is not a growth but a new thing, and the application of an old rule to new circumstances is neither growth nor a new rule. Law and jurisprudence are different things: one is the will of the lawgiver, the other is deduction from law and its application to the affairs of men. When the judge intrudes into the function of lawgiver, the intrusion is most likely to end in failure and injustice. Witness the unseemly tangle in the doctrine of car-trusts and the abuses of receiverships. Have not reforms in the laws come mostly from the statute-maker instead of the case-maker! The careful student of history will find that from the time when the English judges resisted the negotiability of the notes of merchants down to the hour when the last shackle was stricken from the hands of woman in the holding of her own property and taking the fruit of her own labor, the real and healthy growth of the law has proceeded not from the seats of judges, but from the halls of legislative assemblies.

A code would put a stop to the changing of the law by the declaration of the judges. The only logical reason for these changes is that the judges made the law, and the same power which made can unmake or change. This is not said in so many words, but is at the bottom of the practice. I could relate instances of these till I should weary you. But I will give for illustration a single sentence from an opinion of one of the most eminent judges of this country, Mr. Justice Miller, of the Supreme Court of the United States, which will be found in a dissenting opinion from 104 U. S.:

“In regard, however, to a certain class of corporations, a class whose operations are as important to the interests of the community, and as intimately connected with its business and social habits as any other, the appointment of receivers, as well as the power conferred on them, and the duration of their office, has made a progress which, *since it is wholly the work of courts of chancery and not of Legislatures*, may well suggest a pause for consideration.”

Some of us have heard this dialogue between counsel and judge: “There is no precedent for this,” says the former; “Then I will make a precedent,” says the latter. The true function of the judge is to apply the law to the facts. All



lawsuits deal with facts first and with the law afterward. But that only is truly law which has been provided beforehand. The suitor, whose case is to be adjudged, should have been able to know, before he acted, how to conform his acts to the law—that is, to the known law. One of the gravest objections to the law of precedents is that it is or has been made always after the fact; after the fact of the present case, or after the fact in a previous case cited for authority in the present.

Is a code desirable for the lawyers? Let me ask to be conducted to the library of a leader of your bar. I shall find there a gentleman of large experience, of high culture, general and legal, rich in his treasures of books, ancient and modern, not of the law only, but of philosophy, literature, and art; logical in reason, fertile in resource, quick in debate. On his overflowing shelves are volumes of legal reports and treatises, which, if they are not so valuable as an argosy, cost more than the “three thousand ducats” of Shylock. There are, we will suppose, two thousand of these volumes. Here in their presence let us reason together. What are they, and what use is made of them?

There are first of all a hundred or so volumes of the Statutes of Pennsylvania, accumulations of the two hundred years since Penn set his foot upon the soil of this fair city. There are more than two hundred volumes of reports of the decisions of your State courts. There are also treatises and textbooks, perhaps a hundred in all. The rest of the two thousand volumes consist of reported decisions in your sister States, in England, Scotland, and Ireland, and possibly in English provinces. It is safe to say that more than three fourths of those two thousand volumes are such foreign reports—foreign, I say, inasmuch as they are not decisions upon any law or question peculiar to Pennsylvania. Why are they here? They are here, because you think they can aid you in respect of some questions of the common law. I have already pointed out that the common law of another State or of England is not necessarily the common law of Pennsylvania. When, therefore, you refer to a decision of New York, Massachusetts, or Virginia, you do it, presuming that you can get from it some



light on the common law of your own State. In this, however, you may be mistaken, unless you first ascertain, with no little labor, perhaps, whether the court whose decisions you are considering has drifted away from English precedents or contradicted your own. Thence arise the first elements of perplexity and uncertainty. These you would get rid of, if you had a code of your own law. Two reasons and two only can be given for the use of these foreign reports in your libraries, and they are, that their common law is the same as yours and that judges do not make but only declare it. I have already answered the latter reason, and the former you can answer better than I.

A code, moreover, is the only means of stopping the overflow of precedents, which bewilder and impoverish the lawyers of the country. The best estimate I have seen makes the number of decisions in the United States alone sixteen thousand a year. We live under the dreadful necessity of reading, or at least looking at, as many of these decisions as we can afford to buy, for if we do not it may happen that some more diligent and patient adversary searching for precedents may perchance find one just in point, in some far-off State or country, and confound you with the specter, just as you thought your victory won.

A code would mitigate the prevailing evil of long dissertations in the shape of opinions. This evil grows so constantly and so fast that it is already enormous and will soon be intolerable. If it were only the section of a code that had to be examined, instead of the accumulated precedents of a decade, or as it sometimes happens of a hundred years, the interminable discussions of bench and bar alike would cease. An amusing story is told of a scene in a sister State, which has a code. Counsel were arguing against the sufficiency of a deed, and citing authority upon authority, piling Ossa on Pelion, when the opposing counsel ventured to suggest that a certain section of the code settled the question. The judge turned to the section, and then shutting the book said, "Yes, that ends the discussion." This incident shows indeed the reluctance of judges and lawyers to read a statute, but it shows how much good a statute may do.

The first effect, then, of a code, so far as you are concerned, would be to dispense with that larger part of your library which consists of those foreign books. Is not this reason sufficient? The lightening of their labors and the lessening of their expenses are some of the reasons why a code of the common law would be desirable for lawyers. There are, however, higher reasons than these. Lawyers would be enabled the better to perform that duty to their profession and to the public, for which they are best fitted and most strongly impelled. Let them but reflect how much good they could do, by devoting a portion of their time and thought to the perfecting of the laws under which they live, and of which they hold themselves out as professors and practicers; how much they could shorten the length and unravel the perplexity of legal documents, how much to make the crooked ways of justice straight and the narrow ones wide; how much to educate their fellow-citizens in the knowledge of the laws which are the measures of their rights and the limits of their power; how much justice they could procure, how much injustice prevent.

So much for the benefit of a code to the lawyer; now for its benefit to the judge. That follows, of course, from its benefit to the lawyer; for in proportion as the labor of the one is lessened, so is that of the other. Both travel the same road. If the law be made plain for the advocate at the bar, it will be plain, also, for the judge on the bench.

Supposing, then, it be admitted that the general laws of the State, whether lying in statute or in precedents, can be reduced to six or eight thousand sections, as has been done abroad and at home; in Continental Europe, from the Mediterranean to the Frozen Sea; and here in California, Georgia, and Dakota, and partly in New York; and so classified as to be easy of reference, would not the reduction be a good thing for all? What citizen is there so listless or so indolent as not to wish to have such a book in his library; what lawyer is there who would not be glad of such a means of saving expense and labor; what judge who would not feel a load lifted from his shoulders, if he could see the long briefs and the endless citations through which he has now to make his way replaced by such a work upon his table?

And now, young gentlemen of the Law Academy, you who are just entering upon a career which we all hope will be honorable and useful, and you, members of the bar, who having passed the threshold of the temple are enjoying the advantages of the inner chambers, allow me in closing not only to bespeak your assent to the views I have expressed, but to wish you one and all length of days, and withal "honor, obedience, troops of friends."

## DUTY OF THE LAWYER TO IMPROVE LAW

Address to the Yale Kent Club, New Haven, Connecticut, April 19, 1887.

MR. PRESIDENT AND GENTLEMEN: Twenty-two years ago it was my good fortune to address, at the request of one of your professors, an audience of college officers and students in this city. My purpose then was to call your attention to the condition of your legal procedure, the distinction between law and equity, the different forms of action, and the rules of pleading. I remember well coming across the green, in the long June twilight, taking with me a specimen of special pleading then in use here, and comparing it with what it would have been under the procedure established in New York. A smile passed over the audience as I went on reading from one paper to the other; but I was not sanguine enough to expect a change so soon as it came. It was not many years, however, before the change came, and you have now in Connecticut a practice act, which abolished the distinction between legal and equitable procedure, the forms of action and the old rules of pleading, and which is itself a model of brevity and precision. Combined with what you had before, it makes a system of civil procedure not excelled in any other State. One thing, however, is still lacking, and that is such an arrangement of the courts and their business, that a defended lawsuit, when the evidence is all within the jurisdiction, may see its certain ending within a year from its beginning. This is a consummation which ought to be attainable. That system is certainly wanting in active vigor which does not provide for the closing of the most litigated controversy within a twelvemonth if the parties are not obliged to go out of the State for evidence. When Frederick the Great issued instructions to his Chancellor Von Garmer for remedying the disorder and defects in the administration of Prussian justice, he ordered that the pro-



cedure should be cleared of useless formalities and the possibility of terminating suits within a year secured. How far that has been attained in the dominions of the Hohenzollerns I do not know, but I am sure that as much can be attained and achieved in the State of Connecticut as in the kingdom of Frederick.

The title of this club contains two famous names—Yale and Kent, the great Connecticut university and the great New York chancellor. When in 1718 the name of Yale was given to the infant society, which the Christian zeal of the Congregational ministers of the colony had founded, none could have foreseen how the institution would grow and flourish, until it gained a famous name and became an instrument of measureless good to the people, whose motto, *Qui transtulit sustinet*, expressed their faith in the ever-directing providence of God. More than eleven hundred students in all the courses and schools are at this moment taught beneath your roofs, and these elms, waving their branches like plumes to salute alike the coming as the parting youth, rival the oaks of Dodona, in the associations of your academic life.

The other famous name, Kent, is known wherever American, or its predecessor, Anglo-Saxon Norman law prevails. Laying down his great office of chancellor to become teacher and commentator, Kent achieved a distinction which a mere judge could never have reached. Of American jurists he is perhaps the widest known, though we rejoice also in the great names of Story, Marshall, Shaw, Gibson, and Ellsworth, not to mention others of less but only less renown.

The publication of "Kent's Commentaries" was an event in the history of American jurisprudence. Till then we had no general representation of our own distinctive body of law. "Dane's Abridgment" was of a bulk too large for common use. "Kinne's Compendium" does not seem to have had much success. "Swift's Digest" was a remarkable treatise, but its use was limited to this State. Kent's work went far to meet a pressing need, and became at once the most popular of American law-books. If I may judge by the last revision, it has passed through thirteen editions, and, though encumbered with notes, as a ship long at sea comes home covered

with barnacles, it is found in the library of every lawyer who has or expects to have considerable practice. The style is pleasing, the arrangement convenient, and the statement of legal rules in general clear and accurate. I have no criticism to make, further than that which the purpose of this address calls for, and that is, that the work does not give or profess to give much of suggestion for improvement in the law. It treats the body of our law as a completed system; a vast edifice, resting on stable foundations, rising in fair proportions, and divided into convenient and well-furnished apartments. I do not complain of this. Improvement was not the task the commentator set before him, which was description and description alone.

My purpose in this discourse is to show that there is something else for a lawyer to do than simply to learn for himself what there is in this edifice; that it is his further duty to show his fellow-citizens what it contains, and how it may be improved.

If our law were a system complete in itself, incapable of improvement, such study as Kent inculcates would be wise, for then the only task of the student would be to learn what the law is, and of the practicer to apply it to the regulation of conduct. But, so far from being thus complete, our law is a heterogeneous mass, made up of incongruous materials, indifferently put together, by different hands at different times, and without a comprehensive plan. We have, first, what is called the common law, that is, a law of ancient English usages and of precedents made by judges; then we have the constitutions of government, provincial, State, and national, which during two hundred and fifty years we have been receiving from England or constructing and changing for ourselves; and besides these we have the statutes enacted by our own legislative bodies for eight generations. As these different laws had different origins, so their records are different: some are recorded in the archives of government, but more in the reports of courts, and these courts not of one State only, but of all the States, and of the Federal Government, and also of the courts of the mother-country, and I may add of the colonies of the mother-country, wherever the English tongue is spoken. How

difficult, then, how tedious, must be the task of dealing with this immense conglomeration! Yet dealt with it must be. Population increases; the wants and the industries of the people increase also; developments occur on all sides, more often in the right direction, sometimes in the wrong; and we who are affected by them have to see to it that we forward and guide the one, while we hinder or arrest the other. I say we have to see to it—we, all of us, the lawyer in his sphere, the citizen, who is not a lawyer, in his; but inasmuch as the audience I am addressing is professional—that is, made up chiefly of lawyers and law-students—I shall address my observations especially to them, and assume that the reasons which apply to them apply also to the whole people.

First of all, it appears to me a preliminary condition of effective work in improving the law that we should have before us a general view of the law itself. As well might we set to work to improve one of our houses or our ships without seeing the whole of it. The relation of one part to another should be known, that we may the better comprehend the needs of the different parts. When the architect meditates a new wing or a new apartment in the mansion, he surveys the whole; or when the ship-builder takes the ship into dock, he has before him the great structure in all its amplitude and proportions. So I say of improvements in the law, let us begin with taking a survey of the whole legal structure. This can be done only by laying the different parts together and arranging them in some order, to show not only the magnitude of the whole but the relations and dependencies of the parts. This work is codification. I speak of it as a help to improvement, besides its relation to the information of the people. The latter consideration I conceive to be the most important of all, for I hold it to be a political and social necessity, in this country especially, that the laws should be so condensed and arranged as to be within the reach of all who are to obey them. My present purpose therefore is, to insist upon codification for the information of the people first, and then as a necessary preliminary to any considerable improvement in the law itself. I am not going into the whole subject of codification, but content myself with a few observations, to show,



not only how it is an improvement, but a help to further improvement. We can not know how much more we ought to have till we know what we have already. To provide us with that knowledge is therefore needful as a preliminary. This is one reason for a code. Another and a stronger reason is the information it affords to the people, judges, lawyers, and the whole body of citizens, of the laws under which they live, and to which they are to make their daily conduct conform.

Some men say that the common law can not be codified. My answer is, that it has been codified. California, Georgia, Dakota, and New York are my witnesses. There is no sense in disputing whether a thing can be done, when you have it before your eyes already done. Then they say it is not a good thing when done. To this I answer that experience proves the contrary. California, Georgia, and Dakota have made the trial, and found the work good. And if there had been no trial, reason would have led us to the same conclusion. Not to dwell upon the absurdity of insisting that the people are to make our laws, and yet not to know them, it must, from its very nature, be a good thing to teach freemen the laws which are the guides of their conduct. So soon as a rule is established by precedent consecrate it by statute. That is fair, reasonable, and expedient. It is, moreover, a necessity for a people who are to make as well as to obey the laws. But we are told, If you codify you impair the flexibility of the law. They who reason thus suffer from a confusion of ideas. They forget that flexibility is but another name for uncertainty, and an uncertain law is of all things the one to be most avoided and dreaded. I might here take an illustration from the dictionary. Why have a dictionary, our recalcitrant reasoner might say; of all things in the world our common speech should be left unchained; we are forever making new words; let us go on making them at our own free-will. By all means, I answer, but let us in the mean time gather together and set in order those we have, for the instruction and ease of every-day life. And so we have dictionaries; men will have them, men will use them, and, so far from dwarfing or cramping a language, they promote its growth, symmetry, and beauty.



It is high time that Americans should pass out of the state of pupillage, in which they have lived so long, in respect of the body of their laws, as they have passed out of it in respect of their government. We seem to have forgotten that we have reached the age of majority, while we continue to practice the subservience of minority. If we would but reflect that more than two centuries and a half have passed since our forefathers came hither, that though they brought with them the common law of England, they discarded much of it as unsuited to their condition, and enacted a great deal of new law for themselves, and that the whole has been so commingled that it is not easy always to separate the new from the old, nor even to tell what part of the old may even yet be thought unsuitable. Let us rise to the conclusion that we need a new structure, in which all the good material of the old shall be inwrought, while all that is crumbling or decayed shall be laid aside. Then might we behold something in which our eyes might take reasonable pride. We should not lose the benefit of anything that our forefathers have done for us ; we should profit by their practices and their speculations, while we laid American foundations and raised an American building into our own clear native air.

Assuming, then, the necessity of codification, I will make a few observations about the methods of effecting it. And this I do the more readily because I speak in the presence of professors for whom I have great respect, and before the students of a great law-school. There are two aspects of a code ; one as a scientific treatise, the other as a work useful and convenient for daily use. In the one view the code should be arranged and expressed according to the most scientific theory of legal rights and duties, and the dependence of the different parts one upon another ; in the other view it should be arranged and expressed in the way easiest for reference and easiest to understand. Here, again, I will take the dictionary for illustration. Nothing can be more unscientific than alphabetical arrangement, yet nothing is so easy. To the verbal analyst other methods would appear more logical. For instance, he might say, we should arrange the words according to their subjects, or perhaps according to their roots ; he would

never think that an arrangement according to their first letters was philosophical. And yet who would buy for ordinary use a dictionary, in which the words were arranged according to subjects, as, for example, all relating to minerals put in one place and all relating to animals in another, or all derived from the Greek in one part of the book, all derived from the Latin in another, and all from the Aryan in still another?

When once we have the body of the laws before our eyes, we perceive the anomalies. The first and most important is the distinction still kept up between the modes of dealing with real and personal property. The difference in the natures of the two kinds of estates undoubtedly requires some difference in the modes of using them, but why their acquisition and transmission should not be governed by the same rules it is not so easy to see. Why should not dealing in land be as free as dealing in cattle? That great inconvenience and uncertainty result from the present differences must be manifest. Without considering peculiarities of the laws of Connecticut, with which I am not sufficiently familiar, I mention only the devolution of the two kinds of property, occurring at the death of an intestate owner; the real property going to the heir and the personal to the administrator. Now, if it were possible in all cases to know who are the heirs of a deceased person, the inconvenience of the present arrangement would not be so palpable, though even then the being obliged to use different methods when one would suffice would be an inconvenience of itself, but it is sometimes impossible to know who the heirs are, since the fact depends upon the birth, legitimacy, and present existence of children or children's children. I find in the General Statutes of Connecticut that the heirs of a person dying intestate are first his children, and, if one of them happens to have died leaving children, then these also. Is one able always to tell with certainty how many children were born to a citizen of Hartford who died fifty years ago, or how many of them were living at his death, or how many children any of them had while living, and so on through several families? Some of the children may have gone to sea, and not returned after many years. We know instances of doubt and confusion, and can imagine more. In

respect of personal property there is no room for such doubt or confusion. The administrator is an officer appointed by public authority, and there is of course a record of his appointment; the title vests in him; everybody is safe in dealing with him. It would be easy to do away with these anomalies by providing that all property, real as well as personal, in case of intestacy, should vest in an officer; an administrator appointed by the courts. The distribution would be the same; the relatives would get as much as they get now, only they would get it without risk, and purchasers from the administrator would incur no risk of the appearance of an unknown heir or of a contention about the legitimacy of children.

Another of the anomalies which should be eliminated from our legal system is the distinction between sealed and unsealed instruments. Can anybody give a reason for this distinction, except the historic one that seals were used when most men were unable to write? Now, when most men do write, why use the seal, or, if the seal is used, why give it a significance and importance not given to the writing? I find in your Revised Statutes a provision that a deed of real property must have a seal and two witnesses at the least. You can not transfer to your neighbor a cabin for a hundred dollars, without these ceremonials; but you may transfer to him a million dollars' worth of railway-stock by a simple signature without seal or witness! Upon a sealed instrument you may bring a suit within seventeen years, but if the seal be wanting you must sue within six years. Is it a reason why these anomalies should be retained in the valley of the Connecticut, because they came from the valley of the Thames?

One of the most imperative and most pressing of all the improvements required in the practice of our profession is the thorough reformation of legal documents. Here, fortunately, you are relieved of a part of the burden pressing upon us in New York, but still much remains to be done even here. I have in my hand a warranty deed, a mortgage deed, and an ordinary penal bond, such as are now in use in this State. Let us run over them together and observe how many superfluous words there are. In the bond nearly half of the words we find to be needless, and worse than needless; they have to be



paid for and they tend to mislead: time and labor are wasted by them and worse than wasted. Whose fault is it that the useless words are here? The fault of our profession, of course. It is easier to move in routine than to think for one's self; it gives no trouble to copy a form of words, which everybody uses, while it does give trouble to shorten or replace them, and so they are kept on from generation to generation, the lawyers writing them and the clients paying for them. I wish there were a professorship of legal expression, or a course of lectures on legal phraseology, or some teaching in our law-schools about the best means of expressing ideas in legal transactions, whether these transactions be statutes, or contracts, or testaments. When you receive a student for matriculation or dismiss him for graduation, you give him as an exercise a trial in Greek or Latin. I wish you would give the law-student an exercise in English, which I think would be good for his own profit and the ease of his future clients.

The next improvement in the laws which I would suggest is the assimilation of the commercial laws of this State with that of the other States, or rather, I should say, the assimilation of the commercial laws of all the States. The difference in this branch of the law in different States is a much greater inconvenience than the like difference in respect to other branches. You may keep the rules of real property distinct from the rules of personal; you may have one law of trusts, or of descents, for land in the county of Fairfield, while there is another and a different one for land in the adjoining New York county of Westchester, and the owner of both will only suffer the disadvantages of making, perhaps, two wills, or two different provisions in one will, to cover both estates; but when you consider the rights of parties to commercial paper, which passes from hand to hand and from State to State, you encounter serious difficulties, if there be one law at New Haven and another at New York. So, too, with regard to personal condition and the domestic relations. It would be most inconvenient if a youth were to come of age at twenty-one in Hartford, and at twenty-five in Brooklyn; that is to say, if a young man, who is regarded as mature on this side of the line, were to become immature the moment he crossed Byram



bridge. It so happens, indeed, that the age of majority is the same in both States, but that is because New York was taken from the Dutch and kept by the English. Consider, however, the domestic relations, especially that of husband and wife, the most important and sacred of all. On this point the laws of the two States differ in material particulars. Marriage must be celebrated with certain formalities in Connecticut; there need be none in New York; but here it is easier to be dissolved than it is there; in other words, marriage in Connecticut is harder to make but easier to unmake than it is in New York. The inconvenience of this condition of the law is great—so great, indeed, that some have proposed an amendment of the Federal Constitution which shall take marriage and divorce out of the control of the States and place them under the control of Congress. For my part, I fear these encroachments on the autonomy of the States. I had rather keep the sanctity of our firesides under the guardianship of our own people. I would have the altar sacred from the touch of other hands than those which surround it; I would guard the concerns of the family, the “lares and penates” of our homes, against the intrusion of stranger eyes or stranger hands. We live in danger of drifting into a consolidation of the States, and the danger is augmenting day by day. If the consolidation is once completed the end of our Government is at hand, and with it the destruction of our liberties. For this reason I would not go another step in that direction, and so I would not accede to the proposal of placing marriage and divorce under the control of Congress. Assimilation, however, I would strive for, and that can be promoted and to a great degree obtained by the study and application of comparative jurisprudence. A general codification of the laws of one State would lead, by slow degrees, perhaps, but it would inevitably lead, to imitation in other States. We have seen it so happen in respect of many most important measures. The tendency to follow and to copy is strong enough, made so by the double desire to obtain the advantages which our neighbors happen to enjoy and to save ourselves from labor.

The subjects thus brought to your notice, gentlemen of the Yale Kent Club, have been passed over rapidly. My address

must be considered as a series of hints rather than as the development of a plan. I have said enough, however, if I have impressed upon your minds the need of study, not only to learn, but to improve the law. This is a duty which you and I and all lawyers owe to our profession, to the State, and to all our people.

## THE LAWS AND LAWYERS OF NEW YORK.

Address delivered at Buffalo, October 13, 1886.

GENTLEMEN: If a stranger were to ask any one of us where he could see the laws of New York, what answer should be given him? He might be shown the seventeenth section of the first article of the Constitution, which declares:

“Such parts of the common law and of the acts of the Legislature of the colony of New York, as together did form the law of the said colony on the nineteenth day of April, one thousand seven hundred and seventy-five, and the resolutions of the Congress of the said colony, and of the Convention of the State of New York in force on the twentieth day of April, one thousand seven hundred and seventy-seven, which have not since expired, or been repealed or altered, and such acts of the Legislature of this State as are now in force, shall be and continue the law of this State, subject to such alterations as the Legislature shall make concerning the same. But all such parts of the common law, and such of the said acts or parts thereof as are repugnant to this Constitution, are hereby abrogated; and the Legislature, at its first session after the adoption of this Constitution, shall appoint three commissioners, whose duty it shall be to reduce into a written and systematic code the whole body of the law of this State, or so much and such parts thereof as to the said commissioners shall seem practicable and expedient. And the said commissioners shall specify such alterations and amendments therein as they shall deem proper, and they shall at all times make reports of their proceedings to the Legislature, when called upon to do so; and the Legislature shall pass laws regulating the tenure of office, the filling of vacancies therein, and the compensation of said commissioners; and shall also provide for the publication of the said code, prior to its being presented to the Legislature for adoption.”

And he might also be shown the twenty-fourth section of the sixth article as it stood before 1870:

“The Legislature, at its first session after the adoption of this Constitution, shall provide for the appointment of three commissioners, whose duty it shall be to revise, reform, simplify, and abridge the rules and practices, pleadings, forms, and proceedings of the courts of record of this

State, and to report thereon to the Legislature, subject to their adoption and modification from time to time."

He would then ask, Where can I see this common law of the last century, these colonial statutes, these resolutions of Congress and Convention adopted in the first fervor of the Revolution, and these acts of the Legislature of the self-constituted State? He would be referred, for the first class, to thousands of volumes of decisions of the courts of England (there were then no reports of decisions of the courts of this State); for the second, to the journal of the provincial Congress and to the great public libraries; and for the third, to one hundred and thirty volumes of statutes. There are really five classes:

"I. Such parts of the common law as were in force on the 19th of April, 1775, and had not expired, been repealed, or altered between that time and the establishment of the present Constitution, January 1, 1847.

"II. So much of the colonial legislation as was in force on the same day, 19th of April, 1775, not afterward expired, repealed, altered, or repugnant to the new order of things.

"III. The resolution of the Colonial Congress in force on the 20th of April, 1777, not expired, repealed, altered, or thus repugnant.

"IV. The resolution of the Colonial Convention, in force on the same day, not afterward expired, repealed, altered, or thus repugnant.

"V. Such acts of the Legislature of the State as were in force January 1, 1847, all of course subject to such alterations as the Legislature might afterward make."

A similar provision was contained in both the previous Constitutions, except that the first designated the common law as "the common law of England," mentioned part of the "statute law of England and Great Britain," as having force here, and made no mention of the resolutions of the Colonial Congress or Convention. It will thus be seen that the changes in "the common law," or "the common law of England," whichever it may be called, made after the 19th of April, 1775, to the present time, are not included in the category of the laws, or, in other words, that the Constitution does not mention the decisions of our own courts since that historic 19th of April, 1775. What is the meaning and what the effect of this strange omission? Every lawyer can mention many instances in which our courts, on questions of common law, have departed from the precedents of the colonial days.



What warrant had they for this departure? None whatever, unless they thought that they knew the law of England better than did English judges, or that they had the right of making and changing the law as they went along, despite the Constitution which gave them all their power.

Need I say more to show the confusion into which our law had fallen when the Constitution of 1846 went into effect, nor of the urgent need there was for the twenty-fourth section of the sixth article, and the concluding portion of the first? If, now, the stranger should ask what has been done under these provisions, he would have to be told that under the sixth article codes of civil and criminal procedure were framed and submitted to the Legislature thirty-six years ago; that the civil procedure was adopted only in part, and was afterward so swollen and distorted as to be hardly recognizable, and to make many think it rather a hindrance than a help to the dispensation of justice; that the criminal procedure after a struggle of thirty years had become a law and was working well; and that under the first articles political, civil, and penal codes were prepared and submitted to the Legislature more than thirty years ago, but that only one of them, the penal code, had been enacted, and that only after a struggle of fifteen years; that the civil code had been twice rejected by the Assembly and thrice passed by it, on two occasions receiving the assent of the Senate but failing to obtain the approval of the Governor; and that the political code had never received any attention from the Legislature! If he were then to ask where is that "common law" to be found which formed the law of the colony of New York on the 19th of April, 1775, he might be truly answered that, though many pretend to know, nobody does really know; but he might be shown some thousands of volumes, resting upon the shelves of half a dozen of our largest libraries, and informed that this common law was there. Can a better answer be given to the inquirer than the answer just given? Have we not here a truthful description of the condition of our laws? Who is to blame for it, and who suffers by it? The lawyers are to blame, and the people suffer. For a measure of the suffering we have but to look at the crowded calendars, the long delays, the weary suitors, the

burdensome expenses, the appeals from court to court, the frequent reversals, the new trials, the frequent miscarriage of justice. How, then, do we get on? You know very well. We have from 200 to 250 judges in the State, counting the surrogates and county judges, but not counting the justices of the sessions or the justices of the peace. Whenever a controversy comes before any of these 200 or 250, they, of course, decide it as best they can. What the best is may be inferred from the following statistics, taken from a report made in the summer of 1885 to the American Bar Association on the delay and uncertainty in judicial administration. The last volume then published of the reports of our Court of Appeals, the ninety-seventh, contained 79 decisions, of which 38 were reversals. The judges cited in their opinions 449 precedents, of which 353 had been made in New York, 56 in England, Scotland, and Ireland, 8 in our Federal courts, 7 in Massachusetts, 4 in Pennsylvania, 3 in Vermont, 2 in Connecticut, 2 in New Hampshire, 2 in California, 2 in Minnesota, 2 in Alabama, and in New Jersey, North Carolina, Kentucky, Florida, Virginia, Indiana, Maine, and Iowa, 1 each. A single case reported in that volume 97 shows that the counsel on the two sides cited 285 decisions, of which 125 had been made in New York, 61 in England, 2 in Ireland, 4 in Pennsylvania, 4 in North Carolina, 4 in Massachusetts, 2 in New Hampshire, 2 in New Jersey, 2 in Kentucky, 2 in the Federal courts, and in Maine, Vermont, Iowa, and South Carolina, 1 each. The number of cases mentioned in this volume as cited by counsel was not counted, but those in volume 88 were counted on the occasion of an address delivered in 1883, and they amounted to 5,037, cited, be it remembered, as precedents for the Court of Appeals to follow, if it chose. The thirtieth volume of Hun's "Supreme Court Records" contains 169 cases reported in full or in part, of which 75 were reversals, while there is also a list of 464 other cases not reported, of which 127 were reversals. This volume shows the work of five months.

So much for the laws of our good State. What, then, is to be said of the lawyers? The first observation to be made is that the number is excessive, in proportion to the population. Exactly how many there are I can not say, because there is

no general and authentic list, and the number has to be gathered from the rolls of the Supreme Courts in the several districts, or from the court calendars in the different counties. I have not been able to get all of these, but from those I have, and they are from all the counties but four or five, and from rough estimates for the rest, I think there must be something like 11,000 in the whole State, of whom from six to seven thousand have offices in the city of New York. France, with a population of 40,000,000, has 6,000 advocates, about 1,250 *avoués* and 1,150 notaries, all of whom do the work of attorneys and counselors with us. Germany, with a population of 45,000,000, has 5,000 advocates, and if the proportion of the others is the same as in France, 2,000 of these, so that the proportion of lawyers, including *avoués* and notaries, to population, is in France, 1 to 4,762; in Germany, 1 to 6,423; in New York, 1 to 455!

The next observation to be made concerns the character of the profession. It is a common remark that its character is not as high as it was once. I do not assent to this estimate. English literature from time immemorial has teemed with scoffs at attorneys: on the stage they have always been represented as fraudulent tricksters; Dickens has made Dodson and Fogg immortal as types of experts in chicane; and in our state, so long ago as 1818, a statute was passed indirectly imputing to lawyers the practice of buying claims with intent to bring suits upon them, and prohibiting such purchases in future. Could anything worse be said or done for us now? Our ranks appear to me to contain a large proportion of high-minded, honorable men, and as many persons of ability and learning as it ever had, in proportion to the whole number of members. Any one who listens to the arguments of leading advocates will be slow to admit that there has been a falling off in vigor of intellect, in power of reasoning, or in richness of learning. The increase of numbers can hardly make the average lower than it used to be, though it may increase the number of those who ought not to be in the profession. Undoubtedly there is an unusual rush of young men, but they are generally better trained in the science of the law than beginners were in the old days, a change due in great measure to the



law-schools. The lessening in public estimation, if lessening there be, which nevertheless I am slow to admit, must be due to the struggles of competition, an unseemly solicitation of business sometimes to be seen, the lack of discipline over the small minority of unworthy members, the indifference of a majority to reforms in the law itself, and last, not least, to the chameptous agreements into which too many venture. A late report made to the American Bar Association suggests publicity as a remedy for the last evil; that is to say, the making it necessary to disclose the agreement in court before the trial, at the peril of defeat if not disclosed.

The duties of a lawyer are threefold, one to the State, of which he is a citizen, and from which he receives the high privileges of his calling; another is to the courts, before which he exercises his functions; and the third is to his clients. If I were to give my opinion of the way in which these several duties are performed, I would say that fidelity to clients is scrupulously observed, so far at least as that they are never betrayed. In my own practice, long and varied as it has been, I do not remember more than two instances in which I thought that a lawyer betrayed his client. I do not think, however, that we as a body do all we can to lighten the burden which the law or its administration lays upon suitors. The particulars and the reason of this criticism I will explain hereafter. Our duties to the State, in respect of the general obligations of citizenship we perform, as well at least as any other class of our fellow-citizens. There is among us, I believe, a less proportion of breaches of trust and of other illegal or scandalous acts. But in respect of our duty to improve the laws of the State and their administration I am sure that we are greatly in fault. As for our duties to the courts, they are in general well performed. Proper respect for the judges, deference to their just authority, and sincerity in professional intercourse, are maintained, with the exception, perhaps, of excuses for delay offered too often, and for reasons too slight.

I pass now to the consideration of those faults, not of commission but of omission, for which I think we deserve to be reproached. If we have not done those things which we ought to have done, we have assuredly "left undone those



things which we ought to have done." Things left undone are the disuse of obsolete and uncouth words, phrases, forms and technicalities at variance with the simplicity and directness in business of our modern life; the reform of discipline, delays in judicial administration, and the condensation, simplification, and general diffusion of a knowledge of the law itself. To begin with language. Turn to the last volume of Reports of the Court of Appeals, the 101st. In every case the opinion of the court is set forth at the top of page after page as "per" a particular judge. Why "per"? Is not "by" just as good? Though not a great matter in itself, here is an example of the tenacity with which so many of us cling to the barbarisms of a forgotten age. Our legal literature is full of blemishes like this or worse. The wonder is that, instead of being apologized for as a bad habit, the practice is frequently defended as justifiable, and a departure from it is treated as an enormity. The civil code prepared for this State has been denounced, over and over again, for having what is called a novel and repulsive nomenclature. Novel and repulsive indeed! "Beneficiary" is substituted for "*cestui que trust*," a change recommended by Story and by the revisors of our statutes so long ago as 1830. I could mention other instances, but this is enough. When the Legislature appointed the practice commission, it directed the commissioners to provide "for the abandonment of all Latin and other foreign tongues, so far as the same shall by them be deemed practicable." They thereupon recommended that the name of the writ of *certiorari* be replaced by that of the writ of review, *mandamus* by mandate, "*ad quod damnum*" by assessment, and that the writ of *habeas corpus* might be known also as the writ of deliverance from imprisonment. These suggestions of change were received with derision by nearly the whole profession, and to this day the jargon of a scholastic time makes part of the common speech of a profession which prides itself on its learning and culture! If these things were, however, to be passed over as matters of taste, the language of deeds, bonds, mortgages, and other documents, which the lawyer prepares and the citizen uses daily, is a substantial grievance. Chancellor Kent in his commentaries sixty years ago gave the fol-

lowing as a good conveyance of land: "I, A. B., in consideration of one dollar to me paid by C. D., do grant to C. D. the lot of land (describing it). Witness my hand and seal." What lawyer has ever used it? I have now before me a deed of land and a penal bond, such as are used every day. The deed begins with these words: "This indenture, entered into, made, and concluded this first day of May, in the year of our Lord one thousand eight hundred and eighty-six, by and between A. B., party of the first part, and C. D., party of the second part, witnesseth," and without the description, but with the full covenants, contains nine hundred and fifty words, eight hundred and sixty of which are superfluous. Why the words "entered into, made, and concluded"? Would not the one word "made" do just as well as the five words used? Then why the words "by and between"? Would not "by" express just as much? If the deed is made "by" the two parties, it is made "between" the two. Go through the document, and you will find the same verbosity throughout. Take now the penal bond, which I will copy entire, thus:

"Know all men by these presents, That I, A. B., am held and firmly bound unto C. D. in the sum of ten thousand dollars lawful money of the United States of America, to be paid to the said C. D., his executors, administrators, or assigns: for which payment well and truly to be made, I bind myself, my heirs, executors, and administrators firmly by these presents. Sealed with my seal, dated the first day of May, one thousand eight hundred and eighty-six. The condition of the above obligation is such, that if the above-bounden A. B. or his heirs, executors, or administrators, shall well and truly pay or cause to be paid, unto the above-named C. D., his executors, administrators, or assigns, the just and full sum of five thousand dollars, on or before the first day of May, which will be in the year one thousand eight hundred and ninety, and the interest thereon, to be computed from the first day of May, one thousand eight hundred and eighty-six, at and after the rate of six per cent per annum, and to be paid half-yearly on the first days of May and November in each and every year, until the just and full sum of five thousand dollars with interest as aforesaid has been fully paid, then the above obligation to be void, otherwise to remain in full force and virtue."

Now, supposing a penal bond to be the proper form of an obligation for the payment of money, which it is not and has not been for more than a hundred years, there are here one hundred and forty-three superfluous words, out of the two

hundred and thirty-eight which shine and sparkle upon the face of the glaring instrument. Let us eliminate those which are unnecessary. "By these presents," "held and firmly," "lawful money of the United States of America, to be paid to the said C. D., his executor, administrators, or assigns; for which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents," "the above-bounden," his heirs, executors, and administrators," "well and truly," "or cause to be paid," "unto the above named C. D., his executors, administrators, or assigns the just and full sum of," "which will be," "to be computed from the first day of May, one thousand eight hundred and eighty-six," "and after," "on the first days of May and November, in each and every year, until the just and full sum of five thousand dollars with interest as aforesaid has been fully paid," and "otherwise to remain in full force and virtue." More than half of the instrument is thus seen to be an idle jingle. Yet this form of contract is in common use, is kept probably in every lawyer's office, and is used by some of them many times a day. It is not this form alone that is so faulty. Many, perhaps most of those that I used to see in my practice, contained the expression "his heirs, executors, and administrators" after the name of a contracting party. Every lawyer of any sense knows that for the last hundred years and more every man's contract bound his estate, and it is as idle to say so in the contract as it would be to set out passages from the Revised Statutes. The stereotyped phrase for work, not long ago, and perhaps even yet in some quarters, was "work, labor, and services." Instead of a single word there must be a jingle; for money paid, it must be "money paid, laid out, and expended"; for money had, it must be "money had and received"; an act done pursuant to a statute must be done "under and in pursuance of," and so on to the end of the series. Well, some may ask, What harm comes of it all? Many of the forms are printed, they have been long in use, and are well understood. You might as well ask, What harm comes of taking a long road, when you have a short one? I will tell what harm comes of this iteration and reiteration, this use of unnecessary phrases, this endless jingle of words, "this super-



fluity of haughtiness." They beget and confirm our dreadful habits of verbosity; they make the young lawyers think that these words and phrases mean something, and thus teach falsehood; they lead the minds of old and young to run in grooves; they encumber, and, because they encumber, they tend to hinder, obscure, and confuse; they make it necessary to write, read, and record in the course of a year millions upon millions of useless words, all of which cost a great deal of time and a great deal of money. Bonds, for instance, are copied or described in mortgages; the mortgages must be recorded; and, when a foreclosure takes place, the contracts are commonly set forth in the pleadings; all lead to fees, and the fees are burdens laid upon the shoulders of the borrowers. The patience with which the people who pay for these things and are furthermore hindered by them is phenomenal.

The legal profession of New York is not alone in its adhesion to the old forms to which their education has attached them. So long ago as the 8th and 9th of Victoria, ch. 119, an act of the British Parliament was passed to encourage short forms of deeds. A deed without covenants was expressed in about a hundred words, the covenant of right to convey in nineteen words instead of eighty, that for quiet enjoyment in twelve words instead of one hundred and twenty-three, freedom from incumbrances in four words instead of one hundred and six, further assurance in twenty-two instead of three hundred and eight, and the covenant against the grantor's own act in eighteen words instead of eighty-six; in short, a deed with all these covenants in one hundred and seventy-five words was to suffice instead of nine hundred and upward as theretofore. I am told that the old forms continue, nevertheless, to be used. The use of private seals to authenticate contracts is a relic of barbarism, which serves only to show how the children of this generation love to wrap themselves in the swaddling-clothes of their ancestors. Seals, did I say? Pretense of seals I should have said, not the reality. To use the seal is an act of folly; to make an excuse for it is folly heaped on folly. In those barbarous ages, when writing was an accomplishment rarely learned, the seal was the next best thing, and so it was used. Everybody now writes, and nobody,



or next to nobody, needs to use a seal ; so we write our names, and for a pretense make a sign, which we call a seal. In this State it is a little piece of paper stuck to another piece of paper. In some other States it is only a scrawl. Rights are made to depend on this folly ; and yet we call ourselves civilized, the most civilized generation of all the ages !

Let us pass on to our next great need, which is discipline strong enough and searching enough to reach all who have signed the rolls of attorneys or counsel. In some of the States, especially in those of New England, the discipline of the profession is in the hands of the profession itself. Not so with us. Here the work of discipline is in the hands of the courts alone. The profession has no organization as a body, and hence no control over all its members ; individuals can if they choose complain to the courts, just as any individual citizen can make complaint to a magistrate or a grand jury of an infraction of law, but there is no prosecuting officer and no arrangement for concerted action, except in those counties where a Bar Association has been formed, and these are inadequate, for the reason that they include few members of the profession in proportion to the whole number. The remedy which I would suggest is a Bar Association in every county, which every lawyer should become a member of on his admission to practice, and expulsion from the association should be expulsion from the bar, unless reversed on appeal to the court.

The third great need of our profession is the will coupled with power to lessen the present delay and uncertainty in judicial administration. I put delay and uncertainty together, because they are closely related, and a remedy for one will involve a remedy for the other. And when I mention power as coupled with the will, I mean legal power, power conferred by law. I am, indeed, of the opinion that the will must lead to the power, because our profession, by its numbers and influence rightly exerted, is able to bring all the reforms which are needed to make the administration of justice easier, cheaper, and more certain.

When two years ago a committee of the American Bar Association sent out a circular to the members of their profession in the different States asking information about the prevalent

delay and uncertainly, an eminent member of the bar of this State answered that he "should say that the average length of a defended lawsuit, from its beginning to its end in the court of last resort, could not be much less than five years. Some cases occupy a good deal more time." Is not this a grave reproach? You must be satisfied, as must all who think much about it, that if the bar of this State had the will they would find a way to remove this reproach. The report made and to a great extent adopted by the American Bar Association in 1885 points out the way, and I will venture to repeat its recommendations before I close this address.

For a remedy to much of the uncertainty which now exists in judicial administration I have but to repeat what I have so often said, that I think it is to be found in codification. This for most of my life I have urged upon the people, those who are lawyers and those who are not lawyers, and I shall continue to urge it on all proper occasions. I believe it would be a great help to judges and members of the bar, but more than all to the people, whose servants to a great extent we are, and whom we are bound to assist, even in disregard, if that were needed, of our own immediate interests. The Constitution of our State requires codification. Not that the Constitution requires that a code, as it comes from the hands of commissioners to frame it, should be enacted without change, but it does require that a loyal effort should be made by all members of the State, lawyers as well as those not lawyers, to condense and simplify the laws of the land and reduce them to the form of a code; that the code framed by the commissioners should be accepted, so far as conformable to reason, and when not so conformable should be made to conform. The criminal law has been codified, and enacted, substantive as well as remedial; the civil procedure needs only to be abridged, rearranged and simplified; and the civil code waits to be enacted as law. I do not dwell upon the last, because it has been sufficiently discussed already. Everybody of any sense knows that the opposition to it comes from opposition to all codification. Stronger testimony than it has had to its worth as a code could not well be had. It has withstood all assaults, and has more friends and supporters now than it

had when the contest over it began. Lawyers used to old ways may rail at it as they please, but, until they can produce a better, their railing need not be heeded.

For testimony in favor of codification in general, I now refer only to English experience, in an act of the British Parliament, "to codify the law of bills, cheques, and promissory notes," passed in 1884. This act was prepared by county Judge Chalmers, who, in explaining the process, used this language: "That was the process I went through in drawing the Bills of Exchange Bill. There were about seventeen statutes relating to bills and notes, and about two thousand English decisions to go through. After that I looked into an American book (namely, 'Daniell on Negotiable Instruments') and found no less than seven thousand decisions cited. Of course, I only had to refer to the American decisions for information on doubtful points. I read carefully through the whole of the English decisions in drawing the general proposals, and I think the result of the act is that it substitutes the language of the Legislature, comprised in one hundred sections, for about sixteen hundred decisions and seventeen statutes. I think, if every branch of the law were taken in hand and dealt with in the same way, the result would be similar. I have not worked out the percentage, but I should think you would get the law stated in about one five-thousandth part of the space in which it was formerly stated, and all in one book and in one place, instead of being scattered about, as it is now, like stones on the sea-shore. You find, of course, a decision on a bill of exchange sandwiched in between a decision on an ejectment and a decision on assault." In this passage there is much for you to reflect upon.

Finally, I close what I have now to say, with the recommendations of the American Bar Association, twelve in number, which I beg leave to commend to your acceptance:

"I. The law itself should be reduced, so far as its substantive principles are settled, to the form of a statute.

"II. Summary judgment should be allowed upon a negotiable instrument or other obligation to pay a definite sum of money at a definite time, unless an order of a judge be obtained, upon positive affidavit and reasonable notice to the opposite party, allowing the defendant, on terms, to interpose a defense.



"III. In an ordinary lawsuit the methods of procedure should be simple and direct, without a single unnecessary distinction or detail; and whatever can be done out of court, such as the statement of claim and defense, should be in writing and delivered between the parties or their attorneys, without waiting for the sitting of a judge.

"IV. Trials before courts, whether with or without juries, should be shortened, by stricter discipline, closer adherence to the precise issue, less irrelevant and redundant testimony, fewer debates, and no personal altercation.

"V. Trials before referees should be limited in duration by order made at the time of appointment.

"VI. The record of a trial in every court, in which official stenographers are in attendance, should contain short-hand notes of all oral testimony, which notes, if the court shall so order, shall be written out in long-hand and filed with the clerk; but only such parts should be copied and sent to an appellate court as are relevant to the point to be discussed on the appeal, and, if more be sent, the party sending it should be made to pay into court a sum fixed by the appellate court, by way of penalty.

"VII. A motion for or against a provisional remedy should be decided within a fixed number of days, and if not so decided the remedy should fail. In all other cases a decision within a fixed period should be required of every judge and every court, except a court of last resort.

"VIII. The ordering of new trials should be restricted to cases where it is apparent that injustice has been done.

"IX. Whenever a court of first instance adjourns for a term, leaving unfinished business, the Executive should be not only authorized but required to commission one or more persons, so many as may be necessary, to act as judges for the time being, and finish the business. Such temporary judges should be commissioned in all courts except the court of last resort.

"X. The time allowed for appealing should be much shortened. One month, or at most two, should seem to be enough in all cases.

"XI. Greater attention must be paid to the selection of judges, without which no other reform, however good in itself, can succeed.

"XII. Statistics of the litigation, in the courts of the United States and of each State, should be collected and published yearly, that the people may know what business has been done, and what is waiting to be done."



## OUR POLITICAL METHODS.

Article in "The Forum," November, 1886.

IN August last, the Mayor of the City of New York was engaged for several days in giving the Commissioner of Public Works a hearing upon charges of misconduct. One of them was, that to obtain his office the commissioner wrote this letter to a contractor :

"NEW YORK, *December 26, 1884.*

"MAURICE B. FLYNN, Esq.

"DEAR SIR: In consideration of your securing not less than four County Democracy aldermen who shall vote for my confirmation as Commissioner of Public Works, in the event that the mayor shall send in my name for that office, I hereby agree to place my resignation as commissioner, in case of my confirmation, in your hands whenever you may demand the same; and further, to make no appointments in said office without your approval, and to make such removals therein as you may suggest and request, and to transact the business of said office as you may direct.

Very truly yours,

"ROLLIN M. SQUIRE."

The genuineness of the letter was not disputed, though the commissioner asserted that he thought it was destroyed before the appointment was made. Last May, one of the aldermen of the same city was convicted of bribery, on his vote for a railway through one of the streets, and he is now in the State prison for the offense. Eighteen other aldermen, of the same body, are under indictment for the same crime.

How did these offenses come? They might have come from the sudden lapse of virtuous men, or they might have been the unexpected development of vicious instincts in men of good repute, placed in office by good citizens. Benedict Arnold was appointed by good men; yet he betrayed his country. But of the shameful instances of to-day there were many premonitions; in fact, there has been for years more or less of scandal surrounding the offices held by these accused officials. And any just treatment of the causes or occasions

of these crimes must regard them as the not unnatural outcome of something wrong in our political methods, and it behooves us to know what it is.

The commissioner was a public officer, appointed by the mayor, with the consent of the aldermen, and the mayor and aldermen were all elected by the people. Is not this a government of the people, by the people, and for the people? We are loud in our boasts that it is. Presidents and governors say it in their messages, legislators talk of it in their debates, politicians utter it from innumerable platforms. Well, then, was this commissioner and were these aldermen such as the people wanted, or, if the people did not want them, how did they get into office? These are questions upon which it is well for us to ponder, and to make answer as best we can. How, consistently with our professions and our boasts, did official trusts get into such hands? There is one true answer, and but one. These great trusts got into such hands by the grossest perversion of the electoral machinery, through the grossest negligence of the people. All of us—every man who walks the streets and ventures to hold up his head in the face of these disgraces—all of us are responsible for them. Let us not make excuse for ourselves by throwing the blame upon the politicians; the politicians are just what we make them, or allow them to become.

Wishing to be as exact in figures as possible, I had recourse to official sources. The information obtained related to the election of 1885, because it was easier to get than that relating to the election of 1883, when these aldermen were elected, but it is just as useful for the present purpose. By this information it appeared that the whole number of voters in the city of New York, at the election of 1885, was in round numbers 266,000, of whom 216,000 were registered, and 201,000 voted. To the question, How many persons attended the primary elections? this was the answer: "It is difficult to determine how many persons took part in the primary elections. The only way to arrive at that would be to ascertain the number borne upon the rolls of the various political organizations, Republican, Tammany, County Democracy, Irving Hall, Prohibition, Anti-Monopoly, Labor, and Socialistic. Should say,

however, 25,000." Other information made the number enrolled about 50,000 in all, and the number voting 20,000. Very interesting are these figures. The population of the city at the last census, that of 1880, was 1,206,000, and at the same rate of increase as in the previous five years, it amounted to 1,500,000 in the autumn of 1885. Out of this enormous mass of men, women, and children, the number of those whom our law allowed to vote for public officers was 266,000, of whom only 201,000 actually voted; and they were virtually compelled to choose out of a list of candidates placed in nomination by 20,000 to 25,000 persons. These, and these only, dictated the choice of their servants to the 1,500,000 people in this democratic-republican city. They acted, in truth, as our rulers as much as if each had a patent of nobility. They constituted an oligarchy, the most degrading to us that it is possible to imagine in a civilized city of the nineteenth century.

Does any one ask who these 20,000 or 25,000 persons were? The answer is at hand. There are, it is estimated, 20,000 persons in the city occupying official positions and receiving compensation in salaries or fees. The head of every twelfth household is the holder of an office, or is in public employment. His family and friends are his auxiliaries. We now see where the oligarchs came from. The office-holders or their auxiliaries constitute the active primary electorate, and might not inappropriately be called lords of the primaries and lords of the people, dividing among themselves the \$10,000,000 or \$12,000,000 disbursed from the city treasury for official services, and helping themselves to jobs right and left, to fill their own pockets out of the pockets of the people.

The city of New York may not be worse than its neighbors. Many observers insist that it is as clean, as orderly, as well governed, as any American city. Its people are certainly as high-spirited, as jealous of their rights, as any people anywhere. How, then, is the misgovernment to be accounted for? It is because they whose right it is to govern, and whose duty is commensurate with the right, neglect the duty. They could remedy the evil at any time if they would but take the trouble. Whenever they make up their minds to interfere, they do it, and they do it, for the time, effectually. The Com-



mittee of Seventy, appointed by the mass meeting of citizens upon the discovery of the frauds of the Tweed ring, in fact dictated for a while nominations to office in the city of New York.

What we want, first of all, is the right to govern ourselves in all that concerns only ourselves, call it what you will—local government, self-government, home-rule. We have 1,500,000 people, and concerns of our own which the people of Oneida, of St. Lawrence, Chautauqua, have nothing to do with, know little about, and perhaps care less. Why not let us take care of ourselves? In all that concerns the State and the enactment and execution of general laws, the State should, of course, have the right to intervene, as lord paramount, and should intervene; but there are a thousand-and-one concerns of municipal government which we are more competent to take care of, and have greater interest to care for, than the people of any other part of the State.

Supposing, then, the city left to itself, in respect of its own proper concerns, how can its good government be secured? Not as now, by primaries made up of office-holders and their satellites; not by a government of classes, by whatever name described; but by a real government of the people of the city, by its people, and for its people. How can that be obtained? By some measure, whatever it may be, which shall lead all the people, or so many of them as have votes, to use them in the selection of candidates, no less than in the election which follows. Our present scheme is an election by the many out of a list prepared by the few, so that, in point of fact, we live under a government of the few, carried on in the name of all.

But it may be asked, Is not every man free to offer himself, or get his friends to offer him as a candidate? Certainly he is; but this freedom is so hampered, so beset with impediments, as to be practically useless. First, the expenses of a canvass are enormous, and, if that difficulty were overcome, it would be hard to match the standing forces of either of the organized parties. Take, for example, the mayoralty. In 1884 the city was divided into seven hundred and twelve election districts. Each had to be supplied with tickets, canvassers, and watchers, after all the previous preparation of adver-



tisements, meetings, and speakers. How long would the purse of a self-nominated candidate hold out against the drain of such an outlay? The demands made even upon regularly nominated candidates are almost ruinous. For the election of 1885 the city paid \$190,600, and the candidates probably twice as much, amounting altogether to more than \$570,000. In truth, an election to office, except through the machinery of party, must be very hard and very rare.

It is, therefore, of the first importance that this machinery should be framed and worked in the interest of good government. If all the citizens could be made to take as much interest in the nomination to office as they take in the election afterward, we should have as good a government as our institutions can give us, and that, we think, is the best government to be obtained anywhere in the world. But, though the electoral machinery is carefully contrived, our nominating machinery is as bad as bad can be. How, then, can all the citizens be induced to take part in the selection of candidates? This is the question of questions for us.

According to the laws now in force, and the usages which have supervened, the citizens generally do not and will not attend the primaries. The reasons are plain enough, and will be mentioned hereafter. The upshot of the matter is, that the nominations, not less than the elections, must in some way be so regulated by law as to make every voter express his opinion and preference in respect of the persons to be put in nomination, before he votes for any of the persons nominated.

We must bear in mind that our elective system has two features—the secret ballot and the multitude of elective officers—which, however advantageous they may be considered in other respects, do yet offer great temptation to corrupt combinations, false voting, and false counting. Many statutes have been framed to overcome this temptation, with what effect we know. The usages of party, instead of lessening the temptation, have increased it. The most injurious of these usages, the one which overshadows all the others, is the mode of nomination. The machine is the caucus, which, in theory, is a meeting of members of a party, preliminary to an election, or to a more general meeting, and held for the purpose

of nominating candidates, or agreeing upon party measures. This caucus is not a bad thing in itself, if only the right persons get into it, and it is confined within proper limits. It may, indeed, be the very best means of concentrating the strength of a party for desirable ends. It does concentrate it now to such an extent that in many instances a nomination is equivalent to an election, and in nearly all instances nobody is seriously voted for except the one regularly nominated. It is the abuse of the caucus which has led to so much evil.

See how it works here. The city is divided into twenty-four Assembly districts, each district being the unit in political calculations. The caucus held for the nomination in the district is called the primary. Each party, and each faction of a party, has usually as many primaries as there are Assembly districts. Scarcely any nomination worth looking after is made, that does not come directly or indirectly from these primaries. Formerly, anybody who pleased went into a primary and acted with the rest. Latterly it has been the practice for each party or faction to make a roll of the names of persons to be admitted to vote at the meetings. This was said to be necessary in order to avoid packing with outsiders. If the office to be filled covers a larger district than that of the Assembly, the primaries send delegates to a larger meeting, called a convention. For example, a senatorial district will have a senatorial convention made up of delegates from the Assembly districts, and so of all larger electoral districts. The result is, that the rolls of all the districts for all parties and factions in the city, as we are informed, contain the names of about fifty thousand voters, of whom not half attend the meetings.

Now, as has been hinted, the multiplication of offices to be filled at a single exercise of the franchise is enough to bewilder any voter, however intelligent he may be, and however hard he may try to find out the fitness of the multitudinous candidates. Here is a list of the officers voted for at the election of 1885: Governor, Lieutenant-Governor, Secretary of State, Comptroller, Treasurer, Attorney-General, Engineer and Surveyor, Justice of Supreme Court, Judge of Superior Court, Judge of Court of Common Pleas, two Justices of City Court, Sheriff, County Clerk, President of Board of Aldermen, three

Coroners, twenty-four Aldermen, six Senators, twenty-four Members of Assembly, one Justice of District Court, and one Congressman. Could a scheme be contrived better adapted to foster bargaining between the candidates, or their adherents, and frauds in voting and counting? If one were to abandon every other pursuit from the moment of nomination to the close of election, he would find the time too short, and the work too great, to learn who and what they are who solicit the honor of his vote.

The law already provides for an official announcement, to be made long before an election, of the offices to be filled; it also provides for a registration of all voters in the city, and there are, besides, one or two statutes to prevent frauds at the primary meetings; so that we have but to move further on, though a good way further in the same direction. The suggestions which I venture to make are, that the registration be completed a month before the election; that the voter, when he registers, be required to name the persons whom he wishes to be put in nomination for the offices; and that no person be deemed a candidate or be voted for at the election who has not been thus nominated by at least one tenth of the voters of the district. And in order to procure at least some evidence of fitness and give some information to the voter, no person should be eligible as a candidate who had not been recommended by a certain number of the voters of the district, the recommendation to be in writing, and published for ten days previously in one or more newspapers circulated in the district, or for the same period posted conspicuously at the place of registration. The nominations made by the voters as they register could be in writing, or be given orally to the officers, and recorded by them; and these should be required, within a fixed time, to send a printed list of the nominations to every registered voter, addressed to him by the name and address given at the time of registration. Suppose that in an aldermanic district there were ten thousand voters, no vote for alderman would be received at the election except for a candidate who had received, at the time of registration, at least one thousand votes in favor of his being placed on the list of candidates. The effect of this plan would be to com-



pel the attention of the voter weeks before the election, not only to the offices to be filled, but to the candidates for filling them; to do away with the practice, now too prevalent, of keeping back a nomination until the eve of the election; and to prevent the voting at an election of any person who had not previously signified to the whole body of electors his designation of a candidate. This is but an outline, of which the details could be easily filled. The effect would be:

1. That no vote at an election would be counted except for a candidate previously nominated by at least one tenth of the voters of the district.

2. That no nomination could be made, except upon a previous recommendation by a certain number of citizens, certifying to the fitness of the candidate.

3. That the voter, at the time of registration, would be required to declare which of the persons recommended should, in his opinion, be nominated.

4. That, if he refused to make such declaration, his registration would be rejected.

The plan might not remedy all the evils now apparent, but it would remedy some of them, and it is offered for the consideration of those who think that something should be done, and that speedily, to meet the ever incoming and swelling wave of demoralization and corruption.

The remedy to be applied, whatever it may be, must be devised to meet the evil. That evil, in the present instance, is the non-participation of the body of the people in the nominations made for their suffrages. The majority of the citizens do not now participate. There are various reasons why they do not. One of them is, that the nominating machinery is so contrived as to drown the voices of the many who desire pure and effective government. Every opportunity is afforded for cabal, manipulation, and traffic in votes, and for foisting the schemes of the trained few upon the untrained and unsuspecting many. The quiet citizen, who earns his own living by the honest ways of honorable labor, says to himself: What is the use of my going to the primary in my district, as, if I do, my presence will do no good? I shall find everything cut and dried; a printed ticket, prepared by the politicians in



conclave beforehand, will be passed round; the knowing ones will have their supporters at hand to cast in this ticket, and, if there be any discussion, there will be wrangling, and perhaps a row; I have no guarantee that there will be fair play; so I will stay at home, and, should the nomination prove a bad one, I will vote against it. The nomination is made, good, bad, or indifferent, as it may be, and when the voter goes to the polls on the day of election a printed ballot, containing the name thus put up, is pressed upon him by half a dozen canvassers; and knowing little or nothing about the candidates, and fearing that if he does not put in that ballot a worse one will prevail, and his party be beaten, he deposits the one offered, and becomes the victim or the dupe of a knot of politicians.

The remedy is to get the people into the primaries, or, in other words, to make them all take part in the nomination as they take part in the election. How can this be done? There may be several ways; I have ventured to suggest one.

Objections will, of course, be made to this plan. It will be said to be impracticable, and it will be said to be useless. It will be objected that the party machine will still make the nominations, or that none will be made. To this it may be answered that nominations will not fail, until human nature fails, and that the machine if it makes them, will make them in deference to the general sentiment of the party. It will be possible for disinterested citizens to compel such nominations as will satisfy the judgment and the conscience of the majority of the party. They who wish the best men to be nominated will have only to procure them to be recommended by ten, twenty, fifty, or a hundred of their fellow-citizens, as the laws may require, and then to submit these recommendations to the voters as they come to register. Will the plan interfere with the freedom of the citizen at the last moment to vote for whom he pleases? He is not now permitted to vote if his name has not been registered, and not even then for any but a voter qualified like himself. The comprehensive answer to all objections is, however, that if the plan is likely to give us good nominations, it should be adopted.

Such a plan would, of course, require a change of the Con-

stitution ; but a speedy revision of that instrument seems probable, and it is none too soon to discuss the improvement of our electoral machinery. In the mean time much may be done under the Constitution as it is, by requiring the registration to be completed earlier than is now required, by printing and distributing lists of the names registered, and by careful legal regulation of the primaries. For example, all the primaries might be required to be held at the same time throughout the city, shortly after the registration ; every person should be allowed to vote whose name is on the registry in the district ; and not only false voting or double voting, but false counting, should be punished. Above all, the voters themselves should look after the nominations before they are completed, as attentively as they vote for the persons nominated. Every citizen should make it a point to attend the primary of his party in his own district, to do what in him lies to prevent bad and promote good nominations, and he should set his face like a flint against voting for, or giving money in support of, any ticket or any name which his sense of right does not approve.

The suggestions of this paper have reference especially to the city of New York, the most populous, the most opulent, and the most powerful of all the municipalities of the country. How far they may be applicable to other cities, or to the country districts anywhere, need not be considered now. Certain it is, that our own fair metropolitan city needs to be better governed, and can be governed economically and honestly, if only all the people, or the greater part of the people, within its encompassing rivers do but half their duty.

## NEEDED REFORMS IN LEGISLATION.

An Address before the State Bar Association, at Albany, January 18, 1887.

NEW YORK is sometimes called the Empire State, which I suppose means that it is the foremost State of the Union in population, wealth, and influence. Every loyal citizen must wish to verify and maintain this distinction, which redounds to the credit of the State and the well-being of its people. We have a right to cherish the pride of leadership, if we but have the wisdom to use it well, not only for our own advantage, but for the welfare of those who may be affected by our example.

We boast that we are the heirs of all the ages, and so we are. We have inherited the literature and philosophy of the Greeks, the laws of the Romans, the religion of the Hebrews and the Christians, the enthusiasm of the Crusaders, the thrift and tolerance of Holland, and the sturdiness of England. The battles for freedom, wherever fought, were our battles; Marathon and Châlons as truly as Saratoga and Gettysburg. All heroic acts—the self-sacrifice of martyrs, the daring of explorers, resistance to the insolence of tyrants—are our possessions. We have not always, however, it must be admitted, taken that care of our heritage which wise and prudent heirship should impose. We have not, in all things, profited by the example of our predecessors, either to follow or to turn aside. This, after all, is natural. What child has ever learned as much as it might have learned from the success or failure of its parents, or which one of us has taken seriously to heart the lessons which history has stored for us in its ample treasury? Read as we may whatever the past has written for warning or encouragement, we confront the present with more reliance upon our own skill and foresight than upon the accumulated experience of all our predecessors.

That we boast of our heritage does not imply that we are



bound to cultivate it after the manner of our ancestors. We do not so deal with other ancestral estates. For them new implements have been invented, new machinery introduced, new products of the soil discovered. So should it be with that greater heritage which this generation has received from many lands and peoples. The conditions of modern life are so changed from the old, and especially is American life so unlike the life of our fathers in their ancient homes, that we are in a manner constrained to think and act for ourselves, although we have done it with such seeming reluctance that every departure from the old ways, every disuse of the old methods is viewed with disfavor, as if we were afraid to strike out for ourselves into the free and open air. One would have supposed that, in the two centuries and a half since the first emigration hither, we should have developed more that was indigenous and original. We discourse bravely enough, and resent as we should the reproach of being still a community of imitators. With each incoming year we chant the refrain, "Ring out the old, ring in the new," or that other more sentimental, "Ring out the false, ring in the true"; while we should have chanted in mingled melody, "Ring out of the old whatever is false, ring in of the new whatever is true." The wisest method of treating the magnificent inheritance derived from successive generations is to use it according to our condition and our intelligence, employing all the means that God has placed at our service, to make the world better than we found it, and to leave the heritage to our children not only unimpaired, but with large increase.

Each generation has its own evils to contend with, as it has its own problems to solve, and these evils and problems change with the changing circumstances of the times. A society of immovable social and political conditions exists nowhere among the Western nations. Times change and we change with them, is a maxim as old as Rome. Our fathers had their difficulties to overcome, their fathers still others, and so on in differing forms and gradations from age to age. Our lot is to grapple with the social and political problems arising out of the vast increase of material wealth and the discontent with its unequal distribution which distinguishes our



half of the nineteenth century. And I am persuaded that these problems are to be solved only by a republic. As conditions vary so governments are varied. In one epoch the state is ruled by a monarch, in a later one by an aristocracy, still later by the people. But neither the name nor the form determines the condition of the individual subjects. Any irresponsible ruler may be a tyrant, whether the one, the few, or the many, and all tyranny is abominable. Every human being has rights which no other man or number of men can rightfully take away or infringe. We have studied history to no purpose if we have not learned that wherever power is lodged there is need of restraint, or else the possessor of the power becomes a tyrant, great or small, according to the measure of power. Never is it safe to intrust any man or set of men with the absolute government of other men. Hence the necessity of balances, checks, and safeguards, which must be adapted to the exigencies of the occasion. We have reached a period in the history of the race when privileges and privileged classes are leaving the world, and the protection of the individual, that protection which every person needs, must be obtained from the collective force and the collective will of the whole body. The great right to be let alone, that right of rights, which properly limited and defined is essential to the greatest happiness of the greatest number, must hereafter depend, not upon the antagonism of classes, but upon bulwarks stronger than armies or ranks of privileged men. The great end of government is to secure to the individual his natural rights, and the problem of modern society is how to do this with most effect. In the ancient states, whether they were monarchical or republican, the state was everything, the individual nothing. Christianity has reversed the theory and made the individual everything, the state nothing but the protector of the individual.

Legislation is only one of the functions of government, though it be the one first in dignity and power, and the one on which the rest depend. To enforce obedience is the correlative function, subdivided into two departments, one to judge and the other to execute. That the offices created for the exercise of these two should be more sought than those

created for the first is explained partly by the fact that the number is less and the tenure greater, and partly by the history of government.

The original theory of the English constitution, the germ of our own, was that the monarch was lawgiver, judge, and executive, all in one. By degrees the practice encroached upon the theory, and the exercise of the functions came to be divided into three departments, legislative, executive, and judicial. The forms, however, are still kept up in the old country: acts of Parliament begin with the formula that they are enacted by the Queen's Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in Parliament assembled. The judges are representatives of the Queen, and are supposed to be sitting in her seat, and every executive act is mediately or immediately the act of the sovereign. Such, indeed, is the theory of all monarchical governments. In a republican state the theory is the very opposite, though the tendency to imitate retains many of the old forms. We hold that the people are sovereign, that all government proceeds from them, that they administer it in their own names and by their sole authority, by whatever agency exerted, separating its functions into different departments defined by written constitutions.

These observations are an introduction to the topic of this address, which is the action of that department of the government to which the Constitution has committed the making of the laws.

It is not my purpose to discuss the moral duties of legislators. I could say nothing that has not been said already, and better than I could say it. Every person of sense knows that it is against the laws of God and man to betray a public trust, and that he who perverts public functions to private ends is false to his Maker, false to his own conscience, and false to the community which he affects to serve. My purpose is to contribute, so far as I may be able, to that public sentiment which in the long run makes and unmakes public men, which is ever watchful and exacting, watchful of those who take office and exacting obedience not only to the letter but to the spirit of the fundamental law.

First of all, let us fix in our minds and define the province of legislation—that is to say, of the legislative body. Behind this is another question. What are the just limitations of government itself? There are two currents or drifts observable in modern society, one toward lessening the power of government so long as it rests in the hands of a chief or a class, the other toward increasing it when it has reverted to the hands of the people. The intermediate theory—that is to say, the theory of the American Government—is first to lessen the power of the state over the individual, and then to set stringent limitations upon delegated power. A dictator was possible in the turbulent times of Rome; it is impossible in modern society, and if attempted would break the whole fabric in pieces. The greater part of our actions are beyond the scope of rightful government. We believe in the sacredness of life, in the sacredness of liberty—liberty to act as God has given to each his proper gifts. And so we narrow the scope of human government; and when in constructing a constitution we make and define the different departments of delegated power, we narrow, or should narrow, the scope of that power.

The idea of self-government is inherent in our nature. No sooner has a child reached full age and grown to the dimensions of a man, than his aspiration is to strike out for himself. He feels that he is his own master, and that no one has a right to say to him, I am your lord. The instinct implanted by nature in his soul is that he is a free man, and has the right to govern himself, because he knows more about himself than any other man knows about him, cares more for himself than any other man cares for him, and is more likely to obtain the happiness of which his nature is capable, if he pursues it in his own way, than if another man pursues it for him. What is true of the individual and good for him, is true and good also in respect of local communities having interests separate from the common interests of all. Local government, home-rule, is self-government expanded beyond the individual, embracing all in the like circumstances.

There are thus two questions quite distinct: one, What are the just limits of government itself? and the other, What should be the limitations of a delegated Legislature?



The American idea of government in a commonwealth is a government by all for whatever concerns all, local government for localities, a word I use to designate districts which have separate interests, and self-government for the individual. The theory is as simple as the reason is ample. Inasmuch as all can not meet to decide for all, delegates must be chosen to act for them. These delegates form a Legislature. So that the inquiry as to the proper functions of a Legislature resolves itself into the inquiry, first, What is the proper authority of the whole political body, if all its members were convened? and next, What is the extent to which it is best for all to delegate their power to a few, chosen at short intervals, and acting under strict limitations?

First, what are the just limitations of government? This is a preliminary question to be answered before discussing the just limits of delegated power. As I have said already, it is not every action of the individual that should be held subject to the control of other men. Indeed, most of the concerns of our daily lives are solely our own concerns, with which others have no right to intermeddle. Nature dictates liberty of action. Take one instance among many. There are in the city of New York a million and a half of souls, and in the surrounding districts, within the radius of ten miles, a million more; two million and a half of men, women, and children to be fed, clothed, and housed. If the State were to undertake the task, it would be badly done, or not done at all. The details of administration for such a work would be infinite. One of the hardest problems of war is how to provision an army of a hundred thousand men. So now, whatever may have been the theory of government in other times, it is certainly not our theory that legislation may be extended to every concern of men. If I would go from Albany to Buffalo, I do not ask some official to give me leave, written in a passport. That person would be thought insane who would seriously propose to declare by law in what manner and by what road one of us should travel from New York to Niagara. We all agree that the complex organism which we call the State has no rightful authority to prescribe to the citizen where he shall live or in what calling engage. Most of the actions of our



daily lives are in fact beyond the scope which the habits and the opinions of our age allow to the laws of the land. And the tendency of events is to narrow the scope of government more and more, and then to narrow the limits of a delegated Legislature, so that as often as a constitution is revised, so often the limitations upon legislative authority are drawn closer and closer. We began with the immense subject of religion, and excluded that absolutely from interference by the State. From that beginning we have advanced to other limitations. For instance, the national and the State governments are one and all forbidden to abridge the freedom of speech or of the press, to grant patents of nobility, or pass bills of attainder.

According to our ideal of republican legislation, it should be first of all intelligible, next equal, then effective to protect every person in the enjoyment of his natural rights; and, that done, should leave him alone, except only so far as his co-operation may be necessary in public undertakings needed for the whole body but impossible to individual enterprise. In short, we would have the government powerful for protection, powerless for oppression. Let us compare the actual with the ideal. Are our laws intelligible—intelligible, I mean, to the great body of the people? We know of a truth that they are not. This truth is as well known as if it were self-evident. The laws of this great Commonwealth are not intelligible to the great body of the people; they are not intelligible to the great body of our lawyers and judges, who grope their way through them, with uncertain tread, at the risk and expense of suitors. Do not say that this is an exaggerated picture. An English judge of the last century declared that “no cause ought ever to be given up as desperate.” If this was true then, much more is it true now, when the mountain of precedents has risen into the clouds.

The legislation of a republican state is imperfect if it does not cover the whole ground of general law. You exact of the citizen obedience; then, in the name of reason, tell him what to obey! One of the anomalies of our system, an anomaly caused by the effort to ingraft with the least possible change the monarchical customs of the Old World upon the republican practices of the New, would make of a government of the peo-

ple a government of judges and lawyers, deriving their inspiration and taking their rules of decision not so much from the legislation of their own capitals as from the customs of mediæval ages, the enactments of long-forgotten Parliaments, and the rules, conflicting often and uncertain, which the judges of England made at the beginning, and which the judges of England and America continue to make from time to time to this day. This is not consistent with the true attitude of an American State. Such a State should write its law as it builds its Capitol, in the sight of all men, that he who is to obey may know where to find the commandments. "*Omne ignotum pro magifico*" is an old maxim which can alone explain the awe with which some of our profession regard the common law. One of the sophisms paraded for the defense of judge-made law is its supposed flexibility. What would you say of a flexible contract? There is a rumor that flexible contracts were made for the building of this Capitol. How do you like them? What prudent person, about to make him a habitation, would say to his builder, "Let us have, not a precise contract which will bind us to terms that we both understand and on which we can not disagree, but let us have a flexible one which you can explain one way and I another, and so we shall get on harmoniously"? What would not be good for two persons dealing with each other on equal terms would certainly not be good for the State and the citizen, one commanding obedience, the other bound to understand and obey at his peril.

Then let us consider the equality of our legislation. Equality is equity according to another maxim of the law, however dishonored by non-observance. There can be no equality unless all are treated alike, and all are not so treated so long as one law is made for this citizen and another for that, one for the Eighth District and another for the First. A conspicuous illustration of the evil of State interference with local concerns was given the other day when the chief of the street-cleaning department of our principal city informed its board of estimate and apportionment that it was impossible to keep the streets well paved so long as four or five different corporations were clothed with power to tear up the pavements.

How far our legislation protects the citizen in the enjoy-

ment of his natural rights is a question of too large import to be answered in a single address. Failure in one respect only will I mention, and that is the failure to protect reputation. Of all his rights, that which man in society most values is the right to his good name, and, whatever be the country and its other advantages, if it does not protect that right it will finally cease to protect any. However unpalatable may be the truth, it is the truth nevertheless, that adequate protection we do not give. We recognize the right in theory, but we do not enforce it in practice. We proclaim as fundamental truths that every man has an inherent right to life, to liberty, and to the pursuit of happiness, the last including, of course, the right to his lawful possessions; and of all possessions that of a good name is the dearest.

We come now to the great right to be let alone, the right of individual freedom, which we have already in part considered. Reduced to the last analysis, this is the foundation of all our rights. A person comes into the world with inherent and inalienable rights. Every other person has the same rights, and the rights of all are to be enjoyed concurrently. There are, as I have already hinted, two opposite theories of human rights, as there are two opposite theories of government: one, that the individual holds his rights subject to the will of all; and the other, that he holds them superior to the will of any; one, that the State may control all his actions; the other, that it may control none of them, except so far as to protect the equal rights of every other person, and to employ the collective force of all for the welfare of all when individual effort is inadequate.

Let us now consider our own State government, and especially our State Legislature.

The Constitution of 1846, though it contains many wise provisions and some important safeguards, yet has failed of accomplishing all that was intended and expected, because it trusted too much in recommendations and dealt too little in commands. Take, for example, that clause which declares that "dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law"; an idle provision, which really means noth-



ing and accomplishes nothing. Take that other clause which declares that "corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes and in cases where in the judgment of the Legislature the object of the corporation can not be attained under general laws." Observe how this precept, plain as language can make it, has been observed. For example, at the last session, an act was passed to incorporate the American Mortgage Company. Why could not the object of this act be attained under general laws? Why not, indeed, have a general law for incorporating persons to engage in any lawful business, as has been done in England? It has sometimes happened that the principal outcome of a session of our Legislature has been the enactment of special acts or amendments of acts of incorporation. The vetoes of Governors were interposed in vain, and the evil became at last so great that in 1872 an amendment of the Constitution was adopted which, though inartificially drawn, did yet put a partial check upon special legislation.

The evil has been felt in other States, and efforts have been made to stop it. In South Carolina a statute was passed at the last session, entitled "An act to prescribe and regulate the introduction in the General Assembly of measures relating to private interests, and the conduct of the same in the progress thereof." By this statute it was provided that no bill to create a corporation or change one, or to grant any privilege or other private benefit, should be introduced except by petition, accompanied by a draught bill; that the petition should state why the same object could not be obtained under the general statutes; that in the case of a railway or canal the route should be approximately set forth with the particulars; that if other persons than the petitioners were interested they should have sixty days' notice, besides publication in a newspaper, and that no claim for the payment of money out of the treasury should be received except by petition setting forth the particulars, with a report from the Comptroller-General of the State that he had examined and approved it.

After these general observations, let us pass to some details. The catalogue of our needs is a long one, not only be-



cause there is so much to be done, but because there is so much to be undone. There is time now to mention only a few of the more pressing, and for illustration I will take up the statute-book of 1886. This I do the more readily because one branch of the Legislature of that year is still in power, and because, furthermore, the legislation it gave us was an improvement upon many of its predecessors. The session began on the 5th of January and lasted until the 20th of May, a period of one hundred and thirty-six days. The cost of the session was a little over half a million dollars. Six hundred and eighty-one statutes were enacted; so that each statute, one with another, cost \$734. The first thing that strikes the reader is that 274 of these 681 statutes are entitled as acts to amend former statutes, and that 54 took effect without the assent of the Governor. The same general subject is dealt with in different statutes. There are 26 for canal appropriations, 43 for appropriations to other objects; 69 out of 681 being for appropriations of public money, and costing altogether, if we take one statute with another, \$50,000—that is to say, it cost the State \$50,000 for the Legislature to say how the taxes laid upon the people should be expended. To an outsider it does not clearly appear why these appropriations could not have been all included in one act. Apart from these statutes there are few of general importance, and some of them could have been grouped into one, to the relief of the legislator and the convenience of the citizen. Thus, there are twenty acts to amend the Code of Civil Procedure, twelve for the New York City Consolidation Act, six for the Code of Criminal Procedure, six for the Penal Code; five different acts relate to taxation, four to the power of boards of supervisors; 239 are classified in the general index as relating to corporations, 143 as relating to the city of New York, and 60 to the city of Brooklyn. Of the last two classes, some are placed also in other classes. There are 93 classed as relating to villages, 101 to cities other than New York and Brooklyn. Some of those relating to cities and villages are enacted as complete charters, for example that of the city of Jamestown, extending through more than forty pages of the statute-book; that amending the charter of the village of Oneida, covering eighteen pages; that for

consolidating the laws relating to the village of Canton, sixteen pages; the three together being more than half as long as the proposed Civil Code.

Chapters 329 and 633 relate to the public health, and might advantageously have been brought together into one act; chapter 445, for legalizing the acts of notaries public, might well have been made general, to include acts of other officials in like circumstances; chapter 261, to protect the lives of the people of Brooklyn in the running of elevators, might have been extended to the whole State, unless the lives of Brooklyn people are more precious or less cared for than the lives of other citizens. The general acts relating to corporations might be counted on one's fingers—one of them, chapter 98, relating to religious corporations; two, chapters 333 and 564, relating to corporations in general; two, 551 and 601, relating to railway corporations; and one, 546, to enable certain corporations to appoint policemen.

There are not a few curiosities in the volume. Eighty-four mistakes are noted by the apologetic words "so in the original"; chapter 97, an act entitled "An act trelease to John Hoefler" purports to release to John Hoeftter. Chapter 588, to provide for public or legislative printing, enacts that the Secretary of State, Attorney-General, and Comptroller shall furnish forms for bids, in which they are to be addressed as the "Honorable." Chapter 676 is entitled an act to amend a certain other act entitled "An act to consolide with an act," etc. One statute, chapter 260, is entitled "An act to legalize, ratify, and confirm the vote taken at a special village meeting held in the village of Geneseo, Livingston County, April 1, 1886, for the purpose of raising the sum of \$1,000 to purchase a clock for the use of said village and provide a place for the same, and to authorize the trustees of said village to borrow money and issue bonds therefor." This act cost the State, taking the average cost of a statute, \$734. One act, chapter 443, does not give, either in its title or its contents read by themselves, the least idea what it is for, except that it relates to a police department somewhere in the State. Here is the title: "An act to amend title twelve of chapter 77 of the laws of 1870, entitled 'The Police Department,' as amended

by chapter 495 of the laws of 1873, and chapter 298 of the laws of 1885."

Some of the acts are worthy of special mention: for instance, chapter 488, to provide for uniform policies of fire-insurance; chapter 60, for calling a convention to revise the Constitution; chapter 65, to secure compensation for the grant of a railway franchise in the streets of cities and villages; chapters 151 and 409, in relation to the hours of labor; chapter 410, to establish a board of arbitration between employer and employed; chapters 268, 271, and 310, relating to the dissolution of a railroad corporation, and the winding up of dissolved corporations; chapter 316, to restrain the debt-increasing tendency of counties, towns, cities, and villages; chapter 352, for a "commission to inquire into the most humane and practical method known to modern science in carrying into effect the sentence of death"; chapter 560, to confirm the boundary between New York and Pennsylvania; chapter 572, relating to actions against municipal bodies; and chapter 366, to provide for the draining of wet lands.

Now, if the different chapters which relate to the same subject had been brought together into one statute, and the special acts had been superseded by general statutes, and the local acts had been relegated to local authorities, the number of statutes in the statute-book of 1886 would have been reduced by more than two thirds, and the length of the session proportionately lessened. All important work could have been as well done, debates could have been shorter, the labors of committees could have been diminished. Such, I am persuaded, is the true way of diminishing the burden of legislation, for burden it unquestionably is upon both the constituent and the representative. I would diminish it, not by making the sessions less frequent, but by diminishing the work to be done and thus making them shorter. Annual elections are among our fundamental ideas of free government. Until lately they were the universal practice. Every colonial government had them. History teaches us that the best security for free institutions is frequent recurrence to the people. They are the repositories of all power; their will is the guide of all public men; it is clear, therefore, that they should be fre-



quently consulted, and once a year is not too often. A poor compliment it is to our skill in the construction of a government of the people that we should lessen the occasions of consulting them. Diminish the work that the Legislature has to do; that is the true remedy for excessive legislation, instead of diminishing the opportunities for doing it. That were a strange inconsistency, which should pretend in one breath that the people are the most fit to rule, and, in the next, that the opportunities for them to act should be lessened! Consult the people at least once a year, but consult them only on such matters as concern them; consult the wishes of the whole people upon that which concerns the whole; but leave the local concerns of the different portions of the State having separate interests to those whose concerns they especially are.

This, however, is a digression from our main subject, and I return to that, mentioning at the outset certain matters of form, in respect of which, as they appear to me, beneficial changes might be made :

1. Mistakes in the engrossing of bills might be in great part avoided by printing; engrossing by machinery, as a Lieutenant-Governor presiding in the Senate once ruled. A mistake in print is for obvious reasons sooner detected than a mistake in manuscript, and one correct copy insures the correctness of the rest.

2. Those rules of procedure, which have been carefully framed in order to prevent undue haste in the passing of bills, are commonly set aside, "suspended" the process is called, near the close of the session, the very time when they are most needed. That master of a ship would be thought insane who, coming from fair weather and smooth seas upon a lee-shore and seeing a heavy gale rising, should let his sails run loose, call off his lookout, and throw away his cables and anchors. What would befall him is easy to tell.

3. There should be a standing committee on language to which all bills should be referred for examination and correction in respect of expression, following the example of the Federal Convention, when the Constitution of the United States was framed. Or, what would be still better, special



counsel should be appointed for the Legislature, as suggested by the Governor in his last message.

4. The time when a bill becomes a law, by the signature of the Governor, should be noted in the statute-book by the word "approved" instead of "passed" as now. The latter word is inappropriate, for we never say that an act is passed by the Governor. Bills passed by Congress take effect on the approval of the President, and the time when that is given stands in the statute-book as the time when the bill becomes a law.

5. All general statutes should be published in pamphlet form immediately upon the lapse of the thirty days allowed the Governor after the adjournment of the Legislature for the approval of bills left over. Such is the practice in some of our sister States, as for instance Massachusetts and Connecticut.

6. I can not leave this question of form without mentioning the anomalous practice of publishing among the statutes resolutions of boards of supervisors for dividing townships or changing their boundaries. Thus you may see in the present volume a resolution of the supervisors of Suffolk for establishing the boundary between Riverhead and Brookhaven, numbered as chapter 682, closing the acts passed by the two Houses of the Legislature and approved by the Governor. The least that can be said of a classification so grotesque is that it is a remarkable display of poverty of invention.

Let me now pass to some general observations respecting the substance of legislation.

The ninth section of the eighth article of the Constitution is, as we all know, in these words: "It shall be the duty of the Legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments, and in contracting debts by such municipal corporations." This Constitution took effect with the beginning of 1847. At the end of that year the debt of the city of New York, not counting revenue bonds issued in anticipation of taxes, was a little less than twelve and a half millions; it is now nearly eighty-five millions. The population of the city then was less than half a million; it is now a million and a half, so that the debt has

increased in a ratio more than twice that of the population. This is the severest commentary that can be written. No general law has been enacted for the government of cities. Such a law would not be difficult to frame, and would be most useful if enacted. We should not then have, as we have now, a book of 518 pages for the government of the city of New York alone, nor a separate charter for Brooklyn, another for Buffalo, still another for Syracuse, and so on, a different one for every different city. The evil of these various charters is great: they are more difficult to frame, more difficult to learn, more difficult to execute, than one comprehensive scheme which should establish not one rule for New York and another for Brooklyn, but one for all cities and all citizens. We had lately a conspicuous instance of the burdens we assume and the risks we run when we make different sets of laws upon similar subjects; the indictment of an alderman had to run the gantlet of the courts before it could be settled whether for a particular offense he was to be judged by the penal code or the consolidation act. For the incorporation and government of villages a general law has been enacted, but that did not prevent a special charter for Oneida in the session of 1886.

Like observations might be made respecting that other provision of the Constitution which authorizes the Legislature to "confer upon the boards of supervisors of the several counties of the State such further powers of local legislation and administration as they shall from time to time prescribe." We have counties which exceed in population some of the States of the Union. To say nothing of the county of New York, which has a larger population than any one of twenty-eight of our States, the county of Kings has a larger population than any New England State excepting Massachusetts. These counties could govern themselves better than the State can govern them, in matters of mere local concern. A distribution of functions which should give to them increased powers both of legislation and of administration would be a benefit to them and a relief to the rest of the State, while it would be a measure in consonance with the theory of American institutions. It would not be difficult to devise a scheme of county government that should be adequate to all the needs of the county.

From these general observations I will go on to some particulars of much-needed and most pressing legislation. I do not mention all, because the catalogue is too long. I confine myself to six. The first and greatest of all is the lessening of delay and uncertainty in the administration of justice. These amount to a public scandal. The uncertainty may be measured by the number of reversals on appeal, as they appear in the reports of the Court of Appeals and of the supreme Court. The delay in civil cases is told by a distinguished member of the Albany bar, who stated in a communication to the American Bar Association that the average length of a defended lawsuit, from its beginning to its end in the court of last resort, could not be much less than five years. The delay in criminal cases is given in a report made within the last month by the Board of Police Justices in the city of New York, showing that the accumulation of untried cases in the Court of General Sessions is not less than nine thousand. Here is an extract from this report :

“During the past year 6,096 cases were sent to this court from the police courts and 50 cases by transfer from the court of Special Sessions, making 6,146 cases in all. Of this number 2,943 were felonies and 3,203 were misdemeanors. Some other cases reach this court through the action of the Grand Jury in the first instance, but they are few. A very large number of the cases sent to this court for trial, including many grave offenses of felony, as well as the lighter offenses of misdemeanor, are never tried nor even considered. They are bail cases, and it is a generally recognized fact among practitioners in the court, and conceded by the District Attorney, that there is no time for the trial of these unless it be some case of unusual gravity or importance or one in which the public manifest exceptional interest, as in some recent instances. It is not an unusual occurrence for a trial in this court to occupy more than a week's time, and in a case concluded a few days ago the trial was prolonged for five weeks. Trials which occupy the time of the court for a day or two days are of frequent occurrence. These facts demonstrate that great diligence by the court is required to dispose of the prison cases alone, and bail cases must be pushed aside to wait a more favorable opportunity, which never arrives.”

The following is a quotation from a previous report :

“It frequently happens that such offenders, while at large upon bail, are arrested for the commission of other or similar offences, and in one instance, at least, the same offender has been arraigned and given bail for



trial at the General Sessions for no less than six repetitions of the same offence before the trial for the first offence was had."

Is this delay necessary? Is this uncertainty necessary? If not, why do they continue?

The next most pressing need is to put an end to the abuse of injunctions. A preliminary injunction is a useful, indeed, it is often a necessary process for the prevention of injustice, but its use exceeds anything contemplated when the first code of procedure was framed, and it has expanded at last into an enormous abuse, which requires the most vigorous treatment. If considered as a question of principle, it does, indeed, seem inconsistent with our notions of personal liberty that there should be a public officer, one of whose functions it is to arrest with the stroke of the pen the most important operations of trade, of finance, the fulfillment of contracts, and personal movements, and all these without first hearing the persons enjoined. Nothing can excuse this encroachment upon liberty but the necessity sometimes of keeping things as they are, for a short period, until an investigation can be had. The necessity, however, is the limit of the right, and whatever judge, under whatever circumstances, arrests the movement of parties, before trial and judgment, a moment longer than is absolutely necessary, does a grievous wrong. The evil is patent, the injury is great, and the abuse is allowed to continue year after year. Ample remedies have been proposed, only to be disregarded.

Another subject, which I find many unwilling to talk about, but which I think should be talked about and agitated, until a change is made, is the assessment of election expenses, or rather I should say assessment in the name and under the pretense of election expenses, which is made upon candidates for judicial office. I have no knowledge on the subject, no information beyond that which is conveyed by the newspapers or borne by rumor, but I am led to believe that large sums have been sometimes extorted from judicial candidates to defray what are called election expenses, which I take it means subsidies to politicians, to be disbursed by them as seems to them good. The effect of all this upon the judicial office, and upon the rights of suitors, any man can discern with his eyes shut.



The remedy should be quick and searching. It should be made a misdemeanor for a candidate for judicial office to contribute, directly or indirectly, to election expenses or to any political fund, and if discovered at any time during his office, should the candidate be elected, it should forfeit his place.

Another subject of no small importance is the condition of our law of corporations. Confusion reigns here, beyond that which reigns in so many of our laws, which is saying a great deal. We have several different ways of creating corporations, and as many different ways of managing them when created. There are many thousands of them to be regulated. To say that there is now any uniformity or system would be to provoke a smile. Why can we not have uniformity? Why can we not have simplicity?

Still another pressing need is the improvement of tenement-houses. The Governor has called the attention of the Legislature to this subject in his last message. I will add a few extracts from a description of one of these tenements, taken from a New York paper of last July. The tenement is in Mott and Elizabeth Streets, is called the Big Flat, and is said to be "not half so bad as many other tenements in the precinct." What it is may be judged by the following extracts: "It comprises Irish, Germans, Spaniards, Cubans, Swedes, Italians, Russians, Huns, Poles, Japanese, Chinese, and Turks. . . . The bare, brick walls rising for some six stories from the sidewalk, the dirty mattresses hanging from the windows, the meager faces of men, women, and children, leaning out to catch a breath of free air . . . all give it an air of poverty, degradation, and crime. . . . All through the halls . . . washer-women were busy with their tubs, children were crawling and running about, all more or less filthy and sickly in appearance. . . . In the next room entered, upon a wretched bed a young boy lay dying of consumption. A little child was crawling upon the floor, hideously deformed for want of proper medical care. At a wash-tub in the hallway a young woman was washing industriously in an endeavor to earn enough for this little family. . . . There are ninety-one apartments in the big flats, and two hundred and seventy-

one rooms. In these between twelve and fifteen hundred men, women, and children make their homes."

This subject of tenement-houses leads, by a natural association of ideas, to the condition of destitute children. There are said to be twelve thousand homeless ones under twelve years of age in the city of New York alone, seven thousand of whom have no shelter whatever, ignorant in the morning where to rest at night, and the other five thousand having shelters, if shelters they may be called, too foul for human beings. What are these twelve thousand children likely to come to as they grow up? Most of them can be saved from becoming a burden and a menace to the rest of the community if they are looked after in time. The Children's Aid Society, an institution which has done a world of good, and can not be too highly commended, tells us that twenty dollars for each of these children would give them all comfortable homes in the West. Who can see the wasteful expenditure going on all the time with public money and not grudge a little for this army of waifs, now a formidable menace, but capable of being made an army of workers beside industrious and honest people?

It may perhaps be thought that there is inconsistency between my opposition to the meddlesome theory of government and my advocacy of care by the State for tenement-houses and destitute children, but I think there is none. The regulation of these houses and the saving of these children are really measures of protection for ourselves of a like kind with measures for protection against malarial fevers and contagious diseases. Surely we can distinguish between defending our own rights and assailing the rights of others. The distinction is plain enough.

Gentlemen, you of this Association by your influence, and you of this Legislature by your power, can do us an immensity of good and save us from an immensity of evil. I have heard that Horatio Seymour, one of the most thoughtful of our statesmen, said that for its influence and opportunity of distinction he should prefer a place in the Assembly to any other in the State. Was he not right? Here is the place for a tribune of the people, not to thwart patricians as did the tribunes of old, for here are no patricians to be thwarted, but to stand up

for the right and withstand the wrong. The laws here made and the words here spoken affect directly the largest political community in the Union, and indirectly by force of example not a few of the rest. May they be worthy! Give us leave to live unharmed by the ruffians who scatter pestilence, poverty, and crime around us, or lay upon us burdens grievous to be borne, or eat out our substance, or sell our birthright, or intrench themselves in privilege. We want an administration of justice as sure and speedy as human effort can attain; we want wise, equal, and efficient laws, and we want withal that freedom to be and to do all that God in his providence has offered to human beings, so long as we refrain from invading the equal rights of others. Let us, then, be up and doing, not postponing to the morrow what we can do to-day, and remembering that "the mill never grinds with the water that is past."

## OPEN NOMINATIONS AND FREE ELECTIONS.

Article in the "North American Review," April, 1887.

AN open nomination is one in which every voter may freely participate, and an honest election one in which every vote is fearlessly cast and honestly counted. Have we not these already? We have them in theory, but we have them not in practice.

The discipline or the despotism of parties has perverted them. In this fair city of New York, as often as an election comes round, twenty-five thousand persons instruct the two hundred and fifty thousand or three hundred thousand voters whom to vote for. They are, indeed, told that they may vote for whom they please, but, if they do not vote for the candidates named by the twenty-five thousand, the vote might as well be thrown away. The electors are as much restricted to the list made out for them as if the actors were by law divided into two classes, one called the nominating class and the other the voting class, or, to use higher sounding words, the initiatory Senate and the ratifying Assembly. We might continue to call this kind of government a free one, but it would be, in fact, an oligarchy. And what sort of an oligarchy? Enter any of the primaries and answer.

Such an arrangement of government, however brought about, whether by law or by custom, is unendurable, and if not changed must end in a catastrophe. The people are disgusted with it; the revolt at the last election is evidence of the nervous restlessness caused by it in the body politic. I speak of the city of New York.

Go into the Produce Exchange, the Merchants' Exchange, the Real Estate Exchange, or any other of the Exchanges, enter a counting-room in the city, and ask any of the great dealers or manufacturers for his influence in favor of or against



any measure pending in the Legislature, and he will probably answer that he has no influence whatever, and does not even know who his representatives are; and he may, perhaps, add that if you want influence you must go to the ward politician, the boss of the primaries, the inevitable busybody who takes meetings captive and manipulates conventions, and whose abiding-place is the drinking room on the corner. In vain will you reason with your friend: you may urge upon him the duty of attending to the offices and the laws; he shrugs his shoulders, and answers that he is out of patience with the tricks of the politicians, can not attend the primaries, and if he did his voice would not be heard; and so he leaves the machinery of government to be run by those who make a trade of it, live by it, and maintain themselves by those arts with which we are all familiar.

The air is thick with rumors of corruption in office. What reason there may be for them can not be fully known, except from the proceedings in the courts, but the prevalence of the rumors is an alarming symptom of a public mind, distressed or diseased, whichever it may be. It is, moreover, reasonable to infer from the almost universal belief in the truth of the rumors, that corruption, and a great deal of it, does exist. But whether it be much or little, our safety requires that it should be extirpated. The people are not corrupt; we know that they desire honest and good government; it is to their interest and their happiness to have it. If their agents, or any number of them, are corrupted, or can be corrupted, the fact should be made known to every citizen of the State, the causes found, and the disgraceful plague stamped out, as we stamp out the diseases of cattle.

It would not mend the matter to say that we are no worse than other people; that British politics, or French politics, or German politics, are as bad; they may be as bad, for aught we know, they may be better or they may be worse; but we pretend to have a better and purer government than theirs. We know what makes us comfortable, and we must look to ourselves for protection. Resist the beginning of evil is one of the most prudent of maxims.

Men say we are industrious, we are prosperous, we heap

up riches, and we grow in power. Who are they that are so fortunate ; the laborers, who from end to end of the land fill the air with complaint and menace ; the occupants of tenement-houses, living in filth and misery ; the homeless children, whose ceaseless cry is heard above the shout of revelry and the din of traffic ?

We are, no doubt, making our experiment of government under great advantages, but there are also disadvantages that we have to encounter and overcome. The advantages are the division of the nation into autonomous States ; the partition of delegated power into legislative, executive, and judicial departments ; the extent of unoccupied land ; a suffrage so nearly universal that resort to force need never be had in order to obtain rights. The physical power and the political power rest in the same strong arms. Our disadvantages are the divergent interests of different parts of the country ; the considerable number of uneducated voters ; a population not yet altogether homogeneous ; a large foreign immigration ; and above all the notion, wide-spread in thought and wider in practice, that government is a contrivance for the distribution of offices and jobs. Here are evil forces enough, not indeed to counterbalance, but to hinder and disconcert the good, and to darken at times the forecast of the lover of his country.

The source of all power is the voice of the people. The essential condition of a just vote is a free choice. To escape anarchy, a concentration of the votes is necessary, and with us this is obtainable only through nominations. The problem then is, how to concentrate the vote and yet preserve the independence of the voter. The problem is solved, and solved only, when we have a fair representation of the voters in the *selection of candidates*, followed by a fair *election* from among those selected.

In our present circumstances, and according to our present methods, a free and spontaneous nomination must be a rare occurrence. From the primary to the convention, and from the small convention to the large, there are clamor, overreaching, and confusion. Whoever has attended a presidential nominating convention must remember the turmoil, the bargaining and the clamor, on one side the platform whereon

the delegates were seated ; and on the other sides the immense hall filled with a crowding host of spectators, coming as pretended witnesses, but becoming, as the work goes on, real participants, as if they were so many assessors, sitting to advise, to dictate, and perchance to drown with louder tones the voices of the delegates. A nomination once made by those or other arts is forthwith trumpeted as the free choice of the party, and binding upon the honor of every one of its members.

So it has happened that, while the election is the process with which the law mostly deals, the nomination has become, through the practice of parties, the element of chief importance. If we were sure that good men had been nominated, the election would turn upon principle. As it is, the nomination is made by methods which no man can approve, and then the election is carried by the discipline of party in the name of principle. It is thus the consequence, deplorable as it is natural, that offices and jobs are the stakes for which the politicians play ; the public service is neglected or perverted, offices are multiplied, emoluments are increased, bribery is encouraged, and the public conscience is debauched.

The first thing to be done is to awaken the minds of the people to a sense of the evil and the danger. That done, reform will surely follow, for "where there is a will there is a way." This is a maxim as true in matters of state policy as in the conduct of private life. There is need of immediate and vigorous action. We may not say that we are resting on a volcano, since subterranean fires are beyond our reach, but we are resting in a false security, amid social and political fires that are aglow around us, more formidable than those of the earth beneath, and yet controllable by the vigilance, the prudence, and the energy of man. In this belief let us reflect upon what we can and ought now to do.

With the Constitution of the State as it is we can not *compel* a citizen to take part in nominations to office, for, do what we will, he may go to the polls and cast his ballot for whom he pleases, whether previously nominated or not ; but we can encourage him to take part in the nominations and offer him inducements for so doing. This is within the power of the delegated Legislature now in existence. When the Constitu-



tional Convention acts and the sovereign people ratify, they may *oblige* every voter to take part in the nomination if he takes part in the election. But what may the Senate and Assembly do in the mean time? They may provide by law for paying the election expenses of all candidates nominated in a particular manner, and thus go a great way in the improvement of political methods. Suppose it were provided that registration in cities should be made early in October next before an election; that, at the time of registration, the voter should be requested to name the person whom he would nominate for the offices to be filled, and that the persons thus nominated by a certain number, say a tenth, of the voters registered, should have their ballots printed and distributed at the expense of the county. Would not these conditions tend to purify nominations? The details of a plan, of which this is the merest outline, are easy to be made. It might be provided that no person should be thus nominated except one who had been previously recommended, as fit for the office, by a certain number of the voters of the district.

In some such way as this, the preferences of each voter for persons to be put in nomination could be expressed without inconvenience to him, as he would have to spend no more time than is now required for his registration, would have to attend no other meeting, or expose himself to the wrangle, the turmoil, or other inconvenience of the primaries. One who wanted an office, or whose friends wanted it for him, would have only to be recommended by those who thought well of him, and if one tenth of the voters of his district approved the recommendation, his name would be printed on ballots and distributed without expense to him. The chance of getting the right man in the right place would certainly be increased, the assessments upon candidates decreased, and the domination of the primaries overthrown.

There are no doubt many other improvements important to be made in our electoral machinery. Greater secrecy in balloting can be secured; the scandalous transactions, by which exchanges of ballots are made by traitorous agents without the knowledge of candidates, can be prevented; and those grosser frauds, through which false counting and false certificates are



intruded into the process, can be guarded against beyond peradventure. These, however, are matters into which it is not necessary now to enter. The purpose of this paper will have been gained if it shall arouse any considerable number of our citizens to such a sense of their danger, visibly impending, as to make them look to the *nominations* first of all, act promptly and with the energy of freemen who are in earnest.

## AMELIORATION OF THE LAWS OF WARFARE.

A Memoir addressed to the Institute of International Law, at Heidelberg,  
September, 1887.

AN article in the "*Revue des Deux Mondes*," written five years ago, by Vice-Admiral Aube, of the French Navy, lately Minister of Marine, contains this passage: "The next naval war, especially against England, will be carried on by cruisers attacking her commerce"; and again, "The empire of the sea will belong to that nation of the two which has the most numerous armored fleet"; and, further, "Every power of attack and destruction will be employed against all of England's littoral towns, fortified or unfortified, whether purely peace establishments or warlike—to burn them, to destroy them, or to pitilessly ransom them."

If this be a true picture of war as it might now be waged, then it behooves us to strive, every one of us, to avert so terrible a calamity, and, if it can not be averted altogether, then to make war more humane, and more conformable to modern civilization.

By modern civilization is to be understood the civilization of our day; of this year of grace 1887, more than eighteen hundred years since Christ was born. Notwithstanding the enormous armaments which the nations of Continental Europe have accumulated, till their burden is too heavy for men's shoulders; notwithstanding the preparations making and augmenting, day by day, for a tremendous conflict, the great battle, perhaps, of Armageddon, foretold of old; notwithstanding all these things, the world is actually at peace. On the American Continent there is peace from the utmost North to the utmost South; there is peace between the great monarchies of Asia; there is peace among the civilized peoples of Africa; in Europe, too, there is peace; war is waged nowhere between the

Orkneys and the Euxine; and in Australia, fifth and last of the continents, the people are of one blood, one language, and bound together by one sovereign. The great races are more consolidated than they ever were before. Germany presents a united empire, saving only the Austrian portion; Austria-Hungary is undisturbed; Italy is a united kingdom; Spain a homogeneous monarchy; France a homogeneous republic; Great Britain and Ireland inviolate in their own islands; Russia inviolate in her vast Northeastern dominions; the lesser powers, Greece, Switzerland, Portugal, Holland, Belgium, Denmark, Sweden, and Norway, reposing each in its own autonomy; Turkey afraid to move in any direction, lest it displease some of the great powers—such is the general aspect of this hour. Slavery has been abolished in every country in Christendom. Though there be discontent in the Balkan Peninsula, and the ever-irritating wound in the flank of France, on the side of the Rhine, the peace is yet unbroken, and the gates of the Temple of Janus are shut before the eyes of all the world.

Is there not sense and, withal, spirit enough among men to prevent the reopening of those awful gates? The time is otherwise propitious; the United States, after the fiercest civil war known to history, have resumed fraternal relations, and are celebrating the hundredth anniversary of their Federal Constitution; Great Britain is celebrating the jubilee of the Victorian reign; France is about to celebrate the hundredth anniversary of her Revolution, and homogeneous races are, for the most part, resting under governments of their own choice.

Let us, then, appeal to statesmen, to diplomatists, to the leaders of armies themselves, and, above all, to the people, the traffickers in the markets, the men who toil and spin, the laborers in the workshops and the fields, on whom in the last resort the calamities of war most heavily fall; let us appeal to every man and woman who can help to prevent a catastrophe which may derange the business of the world, give over whole communities to pillage, and hosts of brave men to slaughter.

That differences will arise between nations, as between individuals, is most certain. The nature of the human charac-

ter, the impetuosity of the passions, ignorance of facts, weakness of judgment, pressure of self-interest, all make it next to impossible that nations should always agree in their opinions or their wishes. Hence arise claims difficult to reconcile; rights asserted on the one hand, and denied on the other. How to adjust them is the problem. War never adjusts any difference, it merely subdues; it silences, perhaps, but the roar of cannon is never the voice of reason. Men may continue to repeat, as often as they please, the senseless phrase that war is the last resort of nations, the *ultima ratio regum*, it is nevertheless a phrase wholly false, the wicked forerunner of many a bloody field and many a ruined city.

Where and how is this judge among the nations to be found? There can be but one answer, and that is agreement among the nations themselves to establish a permanent tribunal, or an occasional arbiter, chosen for the time being. Nations have no common superior, and can not be coerced except by compact with one another to which all will oblige each to submit. History has many examples of arbitration; the precedents of success are abundant; the measure is reasonable; it is applicable to every serious question; it can soothe the most acute susceptibility, and satisfy any demand of honor. Why, then, should it not be accepted? Why should it not be deemed the last and best resort of nations, instead of war, according to that other and false saying, which has heretofore led so many astray and sacrificed so many victims?

In some happier age, under some more benignant star, there will yet, we would fain believe, be established among men a great Amphictyonic Council of the nations, with a wider sway than the council of Greece, to which nations will submit, as individuals now submit, with unfaltering deference, to a court of honor.

Shutting our eyes, however, for the moment upon this pleasing prospect, though never forgetting it, let us turn to the next resource, and that is, the amelioration of the laws of war, if unhappily war in some shape should prove to be inevitable, so that the horrors predicted by the man of war whose words were quoted at the beginning of this paper, may never come to pass.



Many persons would prefer the expression customs of war to laws of war, because, as they say, there can be, strictly speaking, no laws where there are no sanctions. Some of these customs, however, have sanctions, a violation of them being punishable by either belligerent, or capable of redress by the courts of all civilized powers. For example, cruelty toward prisoners may be punished by the government of the country toward whose soldiers the cruelty was practiced, as was done by the Government of the United States, in the case of a jailer convicted by court-martial of cruelty toward prisoners at Andersonville. And it can not be doubted that, if a belligerent were to attempt reducing to personal slavery captives in war, the courts of the other belligerent, and the courts also of every civilized neutral, would declare the captives free whenever brought within their jurisdiction. Therefore, though it be true that all the customs of war have not effective sanctions, yet, because many have them, it is better to call them all, uncertain and variable as they are, laws of war.

First of all, the circumstances and the civilization of our age require that it should be deemed a maxim of international law that war is a conflict of arms between nations, represented by their armed forces, and not a contest between or against individuals. Each nation would, of course, be competent to deal with its own people as it might see fit, to permit or prohibit business or intercourse between them and the hostile nation or its members, or any other act which might affect its own warlike operations; but neither should be at liberty to wage war upon the unarmed members or the unprotected property of the other. How far this is to be regarded as law at present may be matter of doubt. One authority has it that "a perfect war is where one whole nation is at war with another nation, and all the members of both nations are authorized to commit hostilities against all the members of the other, in every case and under every circumstance permitted by the general laws of war," and another authority has it that "war puts every individual of the respective governments, as well as the governments themselves, in a state of hostility with each other; all treaties, contracts, and rights of property are suspended; the subjects are in all respects considered as enemies;

they may seize the persons and property of each other." On the other hand, it is confidently maintained, and with far greater reason, that the rule by which private property on land is liable to confiscation "is restricted to special cases, dictated by the necessary operations of war, and as excluding in general the seizure of the property of pacific persons for the sake of gain." As for injury to persons it would be monstrous if, in case of a war between England and France, for example, a private Englishman, sailing in his yacht along the French coast, were at liberty to shoot at and kill an unarmed Frenchman on the shore. The whole world would cry out against the outrage, and the offender would surely be brought to punishment if caught either in England or France. In the formal instructions issued, during the civil war, to the armies of the United States in the field, it was declared that "the United States acknowledge and protect in hostile countries occupied by them, religion and morality, strictly private property, the persons of the inhabitants, especially those of women, and the sacredness of the domestic relations." If such be the true rule of conduct for the armies of a nation, much more is it true of its unarmed members.

There are five other important ameliorations of the laws of war for which, it is submitted, this age is ripe. Others there are, less pressing for recognition and less important :

1. It is neither consonant with reason, nor compatible with the material interests of this generation, that the old rule should continue to prevail, which discharged all obligations of treaties between two nations so soon as they fell into war with each other. Men are brought into closer relations with one another than they ever were brought before. They speak together, though they happen to stand on opposite sides of the earth ; their ships fly to and fro with almost the swiftness of eagles ; it is indispensable that international agreements should be made between nations, and that these agreements when made should not be broken. Men will have canals uniting oceans, and open to all mankind, and they will not suffer these highways to be interrupted by the caprice or the madness of those among them who wish to go to war ; they will have telegraphs under the sea, and fastened to many lands, and

they will not suffer the messages between friendly peoples to be stopped because other peoples become unfriendly; in peace they will make conventions for mitigating the severities of war, and they will not suffer these conventions to be thrown to the winds so soon as the storm of a conflict sweeps by.

Why should war be held to dissolve the obligations of previous treaties between the parties? It is not thus in the relations of private life, nor so provided in any code of national law. It may no doubt happen that the breach of a particular contract by one person absolves the other party from the observance of dependent provisions of the same contract, but nobody ever yet thought that the breach of one contract discharged all other contracts between the same parties.

The present rule is, moreover, uncertain in the construction put upon it. One statesman insists that "the general rule of international law is that war terminates all subsisting treaties between the belligerent states"; on the other hand, an able commentator insists that "if a treaty contains any stipulations which contemplate a state of future war, and makes provisions for such an exigency, they preserve their force and obligation when the rupture takes place." In the treaty made between Prussia and the United States, negotiated by Frederick the Great and Franklin, near the close of the last century, provisions were introduced to soften the asperities of war, and it was especially stipulated that those provisions, so far from being abrogated by a war, were precisely those which were to come into force when war occurred. There is no good reason why a war should suspend any stipulations between nations except those which provide for a continuance of peace. Conventions for the neutralization of international canals, for the protection of sea-cables, for the beneficent work of the Red Cross Society, are binding upon the faith of nations, however hotly they may be embroiled in war. The rule of reason as well as the rule of policy should be that war neither abrogates nor suspends the obligations of a treaty, or other stipulations between the parties, except those which are absolutely inconsistent with a state of war.

2. A formal declaration of war is mentioned by publicists as an essential preliminary to hostilities. There is, however,



no prescribed period for the declaration to precede the war, nor is it thought necessary that the declaration should contain a specification of the grievances for which the war is to be waged, and the preliminary itself is not always observed. The Congress which met at Paris in 1856 did indeed undertake to bind the signatories to some proper rules, but little heed seems to have been afterward given to the action of the Congress. Yet surely the sentiment of our age requires that ample notice should be given and formal complaint made before two nations rush into a war, which not only imperils both, but grievously disturbs the rest of the world. Why, indeed, should not the recommendations of the Congress of Paris be extended to all civilized states, and made obligatory, not only in respect of notice from one adversary to another, but in respect of an invitation to all to use their friendly offices for the prevention of hostilities?

That nations should not act like wild beasts, crouching in hiding and silence for their prey, requires no argument. To strike a man behind his back is thought to be unmanly. Why should it not be thought just as unmanly for a multitude of men to strike another multitude without warning? An assassin smites stealthily. May nations act the part of assassins with impunity? Why, indeed, should not a bully among nations be dealt with as we deal with a bully among men?

In the present condition of the European Continent, with enormous armies facing each other, almost within a stone's-throw, it is of more moment than ever before that the peace should not be broken, without some warning from the aggressor, sufficient at least to put the adversary on his guard, and to let other parties get out of the way.

3. The sack of a place taken by storm, the bombardment of an unfortified town, and the preventing of unarmed inhabitants from leaving a place beleaguered, are all acts of such inexcusable and monstrous brutality, that there ought not to be a voice in their favor in all Christendom. Yet they are not positively forbidden, and all have been practiced in this century. A beleaguered city contains, it may be, tens of thousands of women and children, and feeble old men; they are not combatants; they could not get away if they would;



the besiegers would not let them leave ; an army at the gates forces them back into the fiery den, to be killed by the quick method of shot and shell, or by the slow torment of hunger. And this is what is called war. This is war according to the improved method ! Can not men be manly enough to confine their assaults to men alone, but must needs inflict them upon women and children ? Shame ineffable upon such barbarity, and accursed be laws of war which permit it !

The two excuses made for a sack are not only inconsistent with each other, but both of them are insults to our understanding. One is in substance that besiegers are so exhausted by a long siege that their bravery ought to have the reward of rapine ; the other, that the besieged have made so obstinate a defense, that their bravery deserves no quarter. Both excuses are made in sheer forgetfulness that the pitiless rapine and slaughter fall on those who have had no part in the defense. The wife is outraged and the child is put to death, because the husband and father was brave !

4. The capture or destruction of private property on land is condemned by the voice of the civilized world. Whether private property on the sea should be thus exempt has been a question much debated. The statesmen and jurists of Continental Europe generally favor the exemption ; English statesmen and jurists generally oppose it. Why there should be this difference between property on land and that on water has never yet been shown. Regarded as a question of reason, there is no room for doubt. If war is to be regarded as a contest of arms between the combatants, it should not be extended to non-combatants. Regarded as a question of sentiment the result is the same. It is a cruel thing to take from a peaceful citizen his means of livelihood, simply because war is waged against his country. It is abhorrent to our ideas of justice that he should be deprived of his earnings to satisfy the greed of captors. In truth, the practice is nothing but robbery in the name of war. The Government of the United States has always contended for the inviolability of private property on the sea equally with that upon the land. When the declaration of Paris for the abolition of privateering was presented for its acceptance, it offered to accept, upon the con-

dition that the abolition of private capture should be extended further, to the abolition of capture of private property altogether. The arguments which it put forth were unanswerable; they need not be here repeated.

In a dispatch of Mr. Seward, Secretary of State, to Mr. Adams, then minister of the United States in London, dated September, 1861, the Secretary, while deploring the failure of negotiations then lately pending to ameliorate the law of maritime warfare, from which negotiations he had hoped that "results would flow beneficial not only to the two nations, but to the whole world—beneficial not in the present age only, but in future ages," and trusting that "in some happier time the subject might be resumed," he expressed "the hope that when it comes, Great Britain will not only willingly and unconditionally accept the adhesion of the United States to all the benignant articles of the declaration of the Congress of Paris, but will even go further, and, relinquishing her present objections, consent, as the United States have so constantly invited, that the private property, not contraband, of citizens and subjects of nations in collision shall be exempt from confiscation equally in warfare waged on the land, and in warfare waged upon the seas, which are the common highways of all nations." At the last annual conference of the Association for the Reform and Codification of the Law of Nations, held at London in July of the present year, a majority of those present being Englishmen, a resolution in favor of the exemption of private property from capture or destruction on the sea, to the same extent as on the land, was unanimously adopted. The Governments of Russia and Prussia have repeatedly declared themselves, in the most pronounced manner, in favor of the exemption, and that of France is understood to be inclined the same way.

The justification put forth for the seizure and confiscation of private property at sea is that it tends to shorten the war by increasing its severity. Press this argument to its logical conclusion, and it would justify the most barbarous cruelties, at which the humanity of our age would revolt. There are two ways of carrying on war; one the way of savages, the other the way of civilized men. The savage tortures his vic-

toms, tomahawks the children, scalps the men, and carries the women into captivity. Here is severity with a vengeance! Why does it not shorten the conflicts between savage tribes, or put an end to them altogether? On the contrary, it keeps the land where it prevails in a state of chronic warfare. Look at Scotland in the good old times, when clan was forever fighting clan, when the slogan thrilled the Highlands by night and by day, when the cry for the onset was, "Give their roofs to the flames, and their flesh to the eagles!" then look at Scotland now, her hills glowing in peaceful beauty, her plains golden with harvests, and say which condition of society is the most to be desired. Away with the detestable maxim, "Make war as destructive as possible, that it may be rare and short," and take to heart that other more humane and more just, which a great French publicist once announced, "Do to a country as little harm in war, and as much good in peace, as you can"; the one brings out what there is of bad in man's nature, the other what there is of good.

5. The relations between governments and the governed have in these latter days undergone great modification. Subjects are no longer to be regarded as commodities transferable at the will of the sovereign. The people of a country are considered as essential elements in its government, without whose concurrence no change can take place. Whatever may have been the practice, or the rule heretofore, it is not compatible with our modern civilization that a community should be handed over against its will to an alien government. An apt illustration may be found in the relations between America and England. If, unfortunately, a war should break out between the two countries, and Canada should be overrun by the republican armies, it should not be permissible, against the will of the people of the Dominion, to annex it to the United States. Such we know is not a doctrine of international law now, but it should be made so. The idea is not new. It was a condition of the transfer of Savoy and Nice from Italy to France that it should be sanctioned by a *plébiscite*. In the process of absorption by which Italy became a great and united kingdom, the assent of the inhabitants of each of the disunited fragments was manifested either by



formal vote or by popular acclamation. Tuscany, Modena, Parma, and the larger part of the Roman States, came into the Kingdom of Italy by vote of the people; Lombardy, Naples, and Sicily, by a popular uprising. Apart from the authority of these precedents, the process is demanded by the highest considerations of justice and policy. Popular governments are now the rule in the world; autocracies are the exception; only Russia, Turkey, and China remain. So long as the monarch was everything, and the people nothing, it was natural that the former should dispose of the latter according to his own will, keeping them to himself or transferring them to another, as he saw fit. Now that the reason of the rule has ceased, the rule itself should cease also. The tide of human progress has set for a long time in one direction, and it is now near high tide. Time was when death was the doom of the captive in war; in the course of generations death was commuted to slavery; exemptions from the lot of captivity have followed by degrees, one after another, till the time has come when political slavery, as the result of battles, should follow personal slavery, and both stand condemned. It would, indeed, be a strange contradiction, the scorn alike of gods and men, to forbid a conqueror to enslave a single person, but yet permit him to enslave a whole people! To allow a victorious army to subject the people of a country to a government which they detest, is to allow the conqueror to reduce a conquered people to a modified slavery.

The suggestion here made looks to the future only. The past is past. The present contention is, that the civilization of this age has outgrown the old rule, and that for the time to come the participation of the people in every change of their rulers is demanded not less by abstract justice than the profoundest policy.

Will it be said that these ameliorations, if adopted, would render war so unprofitable as to do away with it altogether? So much the better. War is an unsafe game at the best. The aggressor is generally a culprit, and history shows that there is a Nemesis which finally overtakes the crime. It is not necessary to assume that war is always criminal. Resistance to tyrants may be, as it is often said to be, obedience to God.



But that war is an evil is pronounced by the common consent of mankind. That it is an unmixed evil most men believe. To wage it must therefore be a grievous wrong, except in self-defense. To begin a war is a crime of peculiar atrocity, a crime against the nation assailed, a crime against society, a crime against humanity itself. Everything that can be done should be done to make it impossible, and, whenever not impossible, yet extremely difficult and unprofitable. They who believe that war is always wrong, they who believe that a defensive war is always right, they who believe that an aggressive war may sometimes be a necessity, all these will assuredly welcome suggestions, having the semblance of reason, for lessening the manifold miseries which any war must bring with it.

# MEMORIAL TO CONGRESS ON THE ARBITRATION OF INTERNATIONAL DISPUTES.

JANUARY 15, 1888.

*To the Senate and House of Representatives of the United States of America, in Congress assembled :*

THE memorial of the undersigned respectfully represents that five of them were appointed by the Mayor of the City of New York to be a committee, of which he was to be, *ex-officio*, a member, pursuant to a resolution of a public meeting of citizens, to urge upon the Congress and the President the making of a treaty with Great Britain, for the settlement by arbitration of differences that may arise between that country and our own ; and, in pursuance of this appointment, they beg leave to present this memorial.

The occasion of the meeting was to receive a deputation of Englishmen who had come hither to present to the Congress and President a memorial signed by two hundred and thirty-three members of the House of Commons in favor of a treaty between the United States of America and the United Kingdom of Great Britain and Ireland, stipulating for a reference to arbitration of all differences between the two countries which could not be settled by diplomacy. The fact of such a memorial is a signal manifestation of confidence and good-will ; and the characters of those who signed it and of those who presented it require for it respectful attention. As citizens of a friendly nation we can not be insensible to this manifestation, and as lovers of peace we can not be inattentive to the direction in which public sentiment is tending among the people from whom we derived our origin. Our pride of country will not suffer us to lag behind our English brethren in the interchange of fraternal sentiments, and in co-operation for the welfare of man.

The aim of the proposal is to confirm the friendship and increase the security of each nation. Not that each is not strong enough to repel all attacks, but we know by what suffering and sacrifice an attack is repelled, and therefore how wise and prudent it is to lessen the chances of its coming.

If we look beyond ourselves, it is something to consider what may be the effect of such a treaty as we propose upon the future of mankind. While it is true that, if our two nations can not agree to form such a treaty, no other nations can, it is also true that, when once we shall have made it, our example must have an influence upon other branches of the human family. If the world should see, as we hope it will, that the two great English-speaking nations have promised to live in peace with each other, and have kept the promise and prospered in the keeping, it would not be long before the spectacle would attract the attention and the sympathy of other nations, and by the force of self-interest lead them to disburden themselves of their intolerable armaments, and, leaving the ranks of unprosperous war, take the side of prosperous peace.

It is the daily prayer of one of the churches of Christendom, "Give us peace in our time," and a like prayer goes up from every holy temple.

War is not what it used to be in the days of our fathers. The general of our army has lately declared, on a public occasion, that the weapons of warfare have become so destructive that they must needs cause wars to cease and oblige nations to resort to arbitration for the settlement of their disputes, or, he might have added, modern warfare will reduce mankind to the barbarism of the primeval ages.

War being an unspeakable evil, how shall a nation be prevented from attacking another, for some cause real or feigned, some grievance or some pretense? This is our answer: By agreeing beforehand that it will not attack, without first offering to submit its grievances to impartial arbiters. This would at once put an end to simulated grievances and furnish a remedy for real ones. It would substitute the arbitrament of reason for the arbitrament of the sword. It is easy for a caviler to say that an agreement to arbitrate, made before a dispute begins, will not be kept when the passions become hot in its



progress. This, however, can not be known until the method has been tried. Show us the instance in which an agreement to submit to arbitration the differences between two nations has been broken, and we will admit that the objection may have force.

Since the general pacification of 1815 there have been nearly sixty instances of arbitration for the settlement of international disputes, some of them involving the great questions of international right, and some only the ascertainment of extent of injury. The following is a list, imperfect perhaps, but sufficiently accurate to show that the measure is not only not visionary but eminently practicable :

1. Arbitration between the United States and Great Britain in 1816, about St. Croix River and the lakes.

2. The United States and Great Britain in 1818, about obligation to restore slaves; referred to the Emperor of Russia.

3. The United States and Spain in 1819, respecting Florida claims.

4. The United States and Great Britain in 1827, about boundaries; referred to the King of the Netherlands.

5. The United States and Denmark in 1830.

6. Belgium and Holland in 1834.

7. France and England in 1835.

8. The United States and Mexico in 1839.

9. The United States and Portugal in 1851; referred to the Emperor of the French.

10. The United States and England in 1853.

11. The United States and New Granada in 1857.

12. The United States and Chili in 1858.

13. The United States and Paraguay in 1859.

14. The United States and Costa Rica in 1860.

15. The United States and Ecuador in 1862.

16. Great Britain and Brazil in 1863.

17. The United States and Peru in 1863.

18. The United States and Great Britain in 1863, about the Hudson Bay Company.

19. The United States and Ecuador in 1864.

20. The United States and Venezuela in 1866.

21. France and Prussia in 1867.
22. Turkey and Greece in 1867.
23. England and Spain in 1867.
24. The United States and Mexico in 1868.
25. The United States and Peru in 1868.
26. The United States and Peru in 1869 ; referred to the King of the Belgians.
27. The United States and Brazil in 1870.
28. Great Britain and Portugal in 1870.
29. The United States and Spain in 1871.
30. The United States and Great Britain ; on the Alabama, in 1871.
31. The United States and Great Britain in 1871 ; about sundry claims.
32. The United States and Great Britain (the San Juan dispute) in 1871.
33. The United States and Great Britain (about Nova Scotia fisheries) in 1871.
34. Great Britain and Brazil in 1873 ; referred to United States and Italian ministers at Rio.
35. Italy and Switzerland in 1874 ; referred to United States minister in Italy.
36. Great Britain and Portugal (about Delagoa Bay) in 1875 ; referred to the President of the French Republic.
37. China and Japan in 1876.
38. Persia and Afghanistan (Seistan arbitration) in 1877.
39. Great Britain and Liberia in 1879.
40. The United States and Spain (about Cuba) in 1879.
41. Great Britain and Nicaragua in 1879.
42. The United States and France in 1880.
43. The United States and Costa Rica in 1881.
44. France and Nicaragua in 1881.
45. Chili and Colombia in 1881.
46. Great Britain and Nicaragua (about Mosquito Indians) in 1881.
47. Chili and Argentine Republic (about Straits of Magellan, etc.) in 1881 ; referred to the President of the United States.
48. Holland and Hayti in 1882.

49. The United States and Hayti in 1884.

50. The United States and Spain in 1885.

51. England and Germany (about the Fiji Islands).

52. The United States and Denmark in 1887.

53. Germany and Spain (about the Caroline Islands); referred to the Pope.

54. England, France, and Italy with Chili (about losses in the war between Chili and Peru).

55. Peru and Japan (about the seizure of a Peruvian bark).

56. Nicaragua and Costa Rica (about boundary). Referred to President Cleveland in July, 1887.

57. The Berlin Congress of 1878 was really a court of arbitration held by seven principal powers to settle the claims of all the different states in the Balkan Peninsula.

58. The Danubian Commission, established in 1856, is really a standing international arbitration.

These are instances of occasional arbitration—arbitration entered into as a controversy happened to arise. Within the last two decades a strong movement has been made toward permanent agreements to arbitrate, either general for all differences, or special for questions of a particular character, as for example the interpretation of treaties.

The history of this movement is instructive. In July, 1872, a resolution moved by Mr. Henry Richard was passed by the British House of Commons, in favor of an instruction to the Foreign Secretary to "enter into communication with foreign powers with a view to the further improvement of international law and the establishment of a general system of international arbitration." The example was soon followed in other countries. In November, 1873, a resolution was passed unanimously by the Italian Chamber of Deputies in favor of arbitration. In March, 1874, the second chamber of the Swedish Diet adopted a similar resolution. So did the States-General of the Netherlands in the November following. In January, 1875, a motion to the same effect was carried in the Belgian Chamber of Deputies, and afterward adopted unanimously by the Senate. Although the question has not yet been formally brought forward in the French

Assembly, a resolution was carried there in 1878 referring a petition that had been presented on the subject to the Minister of Foreign Affairs, "to whom," it was added, "shall be left in charge to determine the opportune moment when this idea, already tried with success, should be submitted for the consent of states whose constitution and principles are best adapted for seeking in concert its realization."

In 1878 an Italian statesman, Mr. Mancini, knowing that his government was about to negotiate or renew treaties of commerce with other countries, carried a resolution in the Italian Chamber, recommending that such treaties be accompanied by a stipulation for settlement by arbitration of controversies respecting their interpretation or the consequences of their violation. He was afterward appointed Minister for Foreign Affairs, and himself negotiated some eighteen or nineteen treaties, each accompanied by the arbitral stipulation, one of which was concluded with Great Britain in 1883.

The Berlin Congress of 1884, in which fifteen different powers were represented, held for the settlement of the relations between the different states on the Congo, contained a provision for arbitration in case of disputes between these states.

Switzerland in 1883 proposed to the United States to enter into an arbitral convention for thirty years binding the contracting parties to submit any differences arising between them to a tribunal of three members, one to be chosen by each party, and the third by those two, or if they should disagree by a neutral government. Regarding this proposal the President made use of the following language in his annual message to Congress:

"The Helvetian Confederation has proposed the inauguration of a class of international treaties for the referment to arbitration of grave questions between nations. This Government has assented to the proposed negotiation of such a treaty with Switzerland."

Colombia and Honduras have entered into a treaty by which they have bound themselves to submit all differences to arbitration, the arbitrator to be the President of the United



States for the time being, if the parties do not agree upon a different arbitrator.

Our own country has not only shown its own disposition in favor of arbitration, by the repeated agreements that we have mentioned, but by many expressions of public men. A resolution in favor of general arbitration was passed by the House of Representatives in 1874; one was introduced into the Senate in 1882; another is now pending in the Senate.

President Grant, by example and by precept, recommended such a course to his countrymen. In an address to a Philadelphia society after his return from a voyage around the world, he said: "Though I have been trained as a soldier, and have participated in many battles, there never was a time when, in my opinion, some way could not have been found of preventing the drawing of the sword. I look forward to an epoch when a court recognized by all nations will settle international differences instead of keeping large standing armies, as they do in Europe."

Presidents Hayes and Garfield did not hesitate to declare their concurrence in the same views.

These instances answer the objection that arbitration for the settlement of international disputes is not a practical measure. Other objections have been made, but we think it easy to answer them. It has been said that for a nation to bind itself beforehand to submit its disputes to arbitrators is to waive its independence. They who say this forget that the engagement is reciprocal, and that, when we bind ourselves not to make war upon England, she also binds herself not to make war upon us, and that would be a great step in advance toward that peace on earth which we profess to believe is to follow the military ages, and to be demanded alike by the dictates of reason and the precepts of religion. We do not bind ourselves to submit to wrongs of aggression, we but agree not to commit the wrongs ourselves. When, soon after the close of the last war with England, we agreed with her to keep only a nominal force of ships of war on the Great Lakes, we were not shorn of our independence any more than she was shorn of hers. We agreed that it was better for us, and for all our people on both sides of the line, that the waters of these in-

land seas should be reserved for the white sails of commerce, without menace or disquiet from rival armaments. We bound ourselves, as great and brave nations, to do what great and brave men do in private life, to walk peacefully and confidently, under the protection of mutual faith and honor.

It has been asked, Why provide against possible contention? Wait for its coming, and then, if diplomacy fail us, resort to arbitration. We answer, that this is not the way men do in civilized communities. They provide beforehand the requisite machinery for terminating disputes, because that is best for the peace and order of society. The fact that repression is ready tends to prevent aggression. The effervescence of passion finds a vent, and an explosion from pent-up forces is prevented.

It has been said that a promise in all cases to arbitrate would deprive us of weapons of retaliation, less than war, like those threatened lately in respect of the fisheries. We answer that it is war and war only—the great, dominant, overwhelming evil—which it is the aim of the present movement to prevent. It is the bloody conflict of arms, the human butchery, the cities bombarded, the homes decimated, the widows and children left desolate—it is these miseries that we seek to prevent, and it is the means of preventing them that we are urging upon Congress, the Executive, and the country.

It has been said that a tribunal of arbitration would furnish no radical cure for international jealousies. Perhaps it would not. It is war, not jealousies, that the proposal of arbitration seeks to prevent. Courts of law do not furnish a radical cure, nor any cure at all, for jealousies between citizens of the same state or the same city. Who ever thought of that as a reason for abolishing the tribunals of justice?

It has been said that our experience of international arbitration has not been encouraging. This is said because the Halifax tribunal decided against us. But what about the Alabama tribunal, which decided for us? Do we measure our approval by our success? What, moreover, will our adversaries say? They lose if we gain. The objectors forget that, when two engage in an arbitration, or in a lawsuit, one or the other must lose. But what is the loss of ten millions or a hun-

dred millions compared with the loss of a great war to both the combatants? It has been said that the cost of the battle of Solferino would have sufficed to build a ship-canal across the Isthmus of Darien.

Another class of objectors bid us to bear in mind the unfriendly feelings which the English people have frequently manifested toward us, the two cruel wars we have had with them, and the disdain with which they have sometimes, though long ago and ignorantly, affected to treat us, and would make these recollections reasons for not agreeing to arbitration with them now. To our minds these are the very reasons for providing beforehand an honorable means of settling possible disputes. We might add that we have something better to do than to brood over the hates of buried generations.

Yet, even in the old days of misapprehension and distrust, there were not wanting words of conciliation and promise of mutual forbearance. The first treaty concluded between Great Britain and the United States, under their present Constitution, declared that there should be a "firm, inviolable, and universal peace" between the English king and people and our people, and it provided for two arbitrations to adjust reciprocal claims of English subjects and American citizens for injuries sustained during the war. By a separate article of the treaty it was "expressly stipulated that neither of the contracting parties would [will] order or authorize any acts of reprisal against the other on complaints of injuries or damages, until the said party should [shall] first have presented to the other a statement thereof and verified by competent proof and evidence, and demanded justice and satisfaction, and the same should [shall] either have been refused or unreasonably delayed."

We know that it is one of the traditions of our republic to avoid entangling alliances, and we do not wish to break the tradition. The treaty which we advocate creates no entanglement and no alliance. It would not bind us to help our kinsmen beyond the sea, any more than it would bind them to help us. On the contrary, it would bind them to let us alone, if we let them alone. The tradition has not prevented our entering into many treaties; the statute-books are



full of them. There are treaties of amity and commerce with every civilized country on the face of the earth, filled with minute regulations for the conduct of government and people, and we are at this moment engaged in daily transactions, numberless in fact, under a postal convention, concluded at Berne in 1874, by which we have bound ourselves to twenty other sovereign states.

The people of the United States may take pride to themselves that in so many instances they have submitted their differences to the decision of arbitrators, and have done so oftener than any other people in the world. We shall thus be following only our own precedents if we propose the policy of arbitration to any of our associates in the family of nations, and, more than all, if we propose it to our kindred over the water, one with us in blood, one in speech, and one in free institutions.

We beg, therefore, most respectfully to ask from Congress the passage of a joint resolution, requesting the President to propose to the Government of Great Britain the making of a treaty between the two nations, for a limited period at least, providing in substance that in case a difference should arise between them, respecting the interpretation of any treaty which they have made or may hereafter make with each other, or any claim of either under the established law of nations, or respecting the boundary of any of their respective possessions, or respecting any wrong alleged to have been committed by either nation upon the other or its members, or any duty omitted, it shall be the earnest endeavor of both the contracting parties to accommodate the difference by conciliatory negotiation; and that in no event shall either nation begin a war against the other without first offering to submit the difference between them to arbitrators, chosen as may be then agreed, or, if there be no different agreement, then by three arbitrators, one to be chosen by each party, and an umpire by those so chosen; it being understood, however, that arbitration as thus provided for shall not extend to any question respecting the independence or sovereignty of either nation, its equality with other nations, its form of government, its internal affairs, or its continental policy.



## THE CHILD AND THE STATE.

Article in "The Forum," April, 1886.

"THE HOMELESS BOY" is the title of a woodcut circulated by the Children's Aid Society. It is a sad piece. The little waif sits on a stone step, with his head bent over and resting on his hands, stretched across bare knees, his flowing hair covering his face, and his tattered clothes and bare feet betokening utter wretchedness. Turning the leaf, we are informed that twenty dollars will enable the society to give the boy a home.

Can this picture be real and the statement true? The picture is too real, and that the statement is made in good faith and for reasons sufficient, we have the guarantee of the society's good name and the known fidelity of its excellent secretary, Mr. Brace.

How many of such homeless children are there in the city of New York? We are told that there are at least twelve thousand under twelve years of age; seven thousand of them having no shelter, not knowing at morning where they can sleep at night, and the rest having only shelters revolting to behold. Less than \$250,000, then, would give them all decent and comfortable homes. Every night that these twelve thousand children are wandering in the streets, or lurking about rum-shops and dance-houses, or huddled in dens that are as foul in air as they are foul in occupants, that sum many times over is spent in superfluous luxury. Rich parlors and wide halls are filled nightly with pleasure-seekers, where the air is sweetened with the perfume of flowers, music wafted with the perfume, and the light is like "a new morn risen on mid-noon." The voice of mirth in the ball-room drowns the wail of the children beyond, and, when the night pales into morning, the dancers go home rejoicing and the children go about the streets. Surely there must be something wrong with our

civilization, our Christian civilization, so long as these strange contrasts are permitted to last.

It is not for the lack of sympathy or Christian charity. New York is charitable and generous beyond most cities, and I think I might have said beyond any city of Christendom, which is as much as to say beyond any city of the earth. Private charity is great, and association for public charity is greater. On every hand are asylums, retreats, dispensaries; more than a hundred institutions organized for the relief of poverty and suffering; associations for mutual help established in all trades and nearly all professions; and over four hundred churches have their societies and committees in aid of needy members. How, then, is it that we behold this dreadful apparition of helpless and innocent suffering, these homeless children, who, by no fault of their own, are in want of food, clothing, and shelter, and are lurking in corners or scattered in the streets? It is because there is not a wider knowledge of the extent of the evil, and a closer study of the means to counteract it.

Let us enter into some details.

In one of the tenement-houses of the city, and their number is legion, there is a room, nineteen feet long, fifteen feet broad, and eleven feet high, where live a man and his wife and eight children. They sleep, dress, wash, cook, and eat in this one room. These ten persons have altogether thirty-one hundred and thirty-five cubic feet of air, while the law requires at least six thousand feet—nearly twice as much as they get. From tenement-houses like this there flows out daily a stream of children, ragged and dirty, to pick up rags, cigar-stumps, and other refuse of the streets, or to pilfer or beg, as best they can. This is not the place to describe the horrors of the tenement-house, nor to discuss the duty or failure of duty on the part of the state in respect of its construction and occupation. I ask attention only to the condition of the children, and for illustration I take the case of a boy, five years old, who is found, in a chill November day, barefooted, scantily clothed, searching among the rag-heaps in the street. He is a well-formed child, his face is fair, and, as he turns his bright eyes upon you when you ask him where he lives, you

see that he has quick intelligence. Altogether he is such a child as a father should look upon with pride and a true mother would press to her bosom. Yet the parents are miserably poor, the father half the time out of work, and the mother wain with the care of her family. This is not all. Father and mother both drink to excess, and each is intoxicated as often at least as Saturday night comes round.

Has the state any duties toward this little boy, and if so what are they?

All will agree that it has some duty, at least that of protection from personal violence. May it go further, and rescue the child from its loathsome occupation, its contaminating surroundings, and its faithless parents? I think that it may, and having the right, that it is charged with the duty of rescuing the child. This is a large subject, larger indeed than can be fully treated in this paper, but some of the reasons for my opinion shall be stated. At the outset, let me say that I am not a believer in the paternal theory of government. The great ends for which men are associated in political communities are mutual protection, and the construction of those public works, of which roads and bridges are examples, for which individuals are not competent. The state should interfere as little as possible with the economy of the family and the liberty of the individual to pursue his own happiness in his own way. And as a general rule parents are the best guardians of their children. The family is the primeval institution of the race. The love of the parent is the strongest of motives for the care of the child. But when paternal love fails and the offspring is either abandoned or educated in vice, the state may rightfully intervene. Its right is derived from its duty to protect itself and to protect all its people.

I am not deducing the right of interference from an impulse of the heart, though that be the foundation on which our hospitals and almshouses are built, but I place it upon the inherent and all-pervading right of protection and self-defense. Charity is an individual privilege; the impulse is an individual gift from Heaven. The state is not founded for charity, but for protection. The dictate of humanity is without doubt to take a child from an unfaithful parent and give it



the training most likely to lead to an honest and industrious life. This is to transfer the child from an unclean home to one that is clean, from indecency to decency, from foul air to pure, from unhealthy food to that which is healthy, from evil ways to good. Who can doubt that the greatest good which can be done to a child neglected by its parent, or taught beggary or crime, is to take it from the wicked parent, and give it into the care of one who will teach it not only the rudiments of learning but honest labor? In what other way can we better follow the example of the Divine Master than by caring for these little ones, who are unable to take care of themselves?

Protection, however, is the foundation of the right I am asserting. We must, of course, have a care that interference for protection be not carried beyond its rightful limits. If any general rule could be laid down for marking these limits, it would perhaps be this, that the state should not invade one man's rights in order to protect another's. What the individual can do for himself the state should not undertake. But in the case supposed, the faithless parent has forfeited his right to his child, and the only point to be considered is the relation of the child to the state. This relation involves considerations of economy and of safety, each of which may be considered by itself.

The question of economy has political and social aspects. The prevention of crime and the punishment of the criminal impose upon the state some of its heaviest burdens. The cost of the police, of the courts, and the prisons, makes one of the longest items in the roll of public expenditure. In the year ending September 30, 1885, the maintenance of the three State-prisons cost about \$400,000. Besides these prisons there are penitentiaries at New York, Brooklyn, Albany, Syracuse, Rochester, and Buffalo, and there is a county prison in each county. What all these cost there are no readily accessible statistics to tell. The yearly cost of the police in the city of New York is about \$3,700,000, and that of the criminal courts \$300,000. The cost, defrayed from the city treasury, of prisons, reformatories, asylums, and other charitable institutions, is over \$3,000,000. The expense of prisons alone is with diffi-

culty separated from the rest. These are approximate figures. It is hard to find out how much the people of this State, in all their municipalities and political divisions, pay for police, courts, and prisons. We know that the amount is appalling. Much of this—how much can not be told—might be saved by fulfilling the scriptural injunction, "Train up a child in the way he should go, and when he is old he will not depart from it."

The question of safety is more vital still. Every one of these boys may be a voter ten or twenty years hence. His vote will then be as potent as yours or mine. In countries where the sovereign is a prince it has ever been thought prudent to bestow special care upon the training of an heir to the throne. Here the people are sovereign, and the little boy, now wandering about the streets, neglected or led astray, is in one sense joint heir to a throne. Every dictate of prudence points to his being fitted to fulfill the duties of his station. Who can say that if duly cared for he may not grow to the stature of a leader of the people, ranking with the foremost men of his time, a benefactor of the race, a teacher of great truths, a helper of the helpless, a brave soldier in the "sacramental host of God's elect"? If, on the other hand, he is left to himself in the swift current of want and vice, floating in the scum of sewers and the company of thieves, he will prove a scourge to the state, and may bring up in a prison, or perchance on the scaffold.

For this reason, and the one preceding, it should seem to be the duty of the community to look after children whose parents abandon them or lead them into evil ways, or are incapable of taking care of them.

We have already in many instances acted upon a like theory. The compulsory education acts, the corporations formed to prevent cruelty to children, and the unincorporated societies organized for their relief, are so many agencies established upon this principle. Take, for example, the eighth section of the elementary education act of 1874, as amended in 1876, which provides that the board of education in each city and incorporated village, and the trustees of the school districts and union school in each town, by the vote of a ma-

jority, at a meeting called for the purpose, shall make all needful regulations concerning habitual truants and children between the ages of eight and fourteen, who may be found wandering about the streets or public places during school-hours, having no lawful occupation or business, and growing up in ignorance; the regulations to be such as in the judgment of the board will be conducive to the welfare of the children, and to the good order of the city or town, and to be approved by a judge of the Supreme Court. Suitable places are to be provided for the discipline, instruction, and confinement, when necessary, of the children, and the aid of the police of cities, or incorporated villages, and constables of towns, may be required to enforce the regulations.

The Penal Code makes it a crime to desert a child "with intent wholly to abandon it" (section 287), or to omit without lawful excuse to perform a duty imposed by law to "furnish food, clothing, shelter, or medical attendance" (section 288), or willfully to permit a child's "life to be endangered, or its health to be injured, or its morals to become depraved" (section 289), or "the child to be placed in such a situation or to engage in such an occupation" as that any of these things may happen. Another section (291) provides that a child under sixteen who is found "gathering or picking rags, cigar-stumps, bones or refuse from markets," or without a home, or improperly exposed or neglected, or in a state of want or suffering, or destitute of means of support, being an orphan or being in certain immoral company, "must be arrested and brought before a proper court or magistrate as a vagrant, disorderly, or destitute child." The Code of Criminal Procedure (section 887) declares, as vagrant, any child between five and fourteen, "having sufficient bodily health and mental capacity to attend the public schools, found wandering in the streets or lanes of any city or incorporated village, a truant without any lawful occupation"; and it provides in the next section (888) that when a complaint is made against any such vagrant, the magistrate must cause the child and its parent to be brought before him, and may order the parent to take care of the child, and, if he does not, "the magistrate shall, by warrant, commit the child to such place as shall be provided for



his reception." If no such place has been provided, the child must be committed to the almshouse of the county, and a child so committed may be bound out as an apprentice. A child found begging (section 893) must be committed to the poorhouse, and there kept at useful labor until duly discharged or bound out.

These are very sweeping provisions, but they are said to fail of the effect intended, by reason of defects in the machinery for working them. Indeed, the theory upon which they are framed is in some respects erroneous. A child under twelve should never be treated as a criminal except after conviction for crime, in the few cases in which the child between seven and twelve may be convicted. To treat him as a criminal leaves a stigma, which after-years do not efface. A friend, who lately visited one of the reformatory schools in Boston, described an inspection of the inmates, noting in particular the bearing of a little boy, three years old, who went through the exercises with the greatest spirit, intelligence, and glee. Should this little child be classed with criminals, brought into contact with them, or be exposed ever to be told that he had been so classed? Our laws now use in regard to such a child the expressions "arrest," "prefer complaint," "bring before a magistrate for hearing," and the like. When the word "arrest" is used in respect of legal process it is darkened with the shadow of criminality. Why not say "take," or, better still, "rescue"? A child under seven years of age is, and one between seven and twelve is presumed to be, incapable of committing crime. A policeman finding such a child homeless should be required to bring him before an officer specially charged with the duty of examining such cases, not a police justice. The state would thus appear to take the child under its protection as one of its wards or children. Such should be the treatment of every child under twelve years of age, whatever might be the circumstances; and the same officer should be the one to decide in the first instance whether a child between seven and twelve should be sent to a criminal magistrate.

When a child not charged with crime is brought before such an officer and is shown to be abused or abandoned, what

should be done with him and with the parent? The latter should be required to support the child, so far as the law can make him responsible. The like is required of persons classed as disorderly by section 901 of the Code of Criminal Procedure, and under the education acts is also required of parents who fail to send their children to school. How to reach the parent is a question for the criminal law, with which we are not dealing at present. But for the child, what should be done with him? Most certainly he should be placed in a healthy and sufficient home, and taught the rudiments of knowledge and honest ways. Here the state should seek the aid of private charity, acting through incorporated institutions, because the state can in this way best control the institutions, and look after the treatment and welfare of the children. These agencies are sufficient for the present, and may be sufficient always. Show the people the way in which they can best help the outcast, and their benevolence will supply the motive.

If these views are sound, they lead logically to the following conclusions:

1. That there should be a public guardian of homeless children under twelve years of age, whose duty it should be to find out the condition and treatment of those brought before him, and, when he sees that they require it, to place them in some institution incorporated for the care of such children, to be kept there or sent by them to homes here or in other states. In the category of homeless children may be included not only orphans without homes, but all children under twelve years of age, who are abandoned by their parents, or so neglected or abused as to require that they should be taken in charge.

2. That every police-officer should be required, and every citizen should be permitted, to bring a homeless child before this guardian.

3. That a child under seven years of age should never under any circumstances be treated as a criminal, and a child between seven and twelve should not be so treated until he has been examined by the guardian, and by him sent to the criminal magistrate. No child under twelve should ever be

left in the society of criminals under any circumstances whatever.

This paper has already reached the limit intended. It has not gone into particulars; on the contrary, it has been carefully confined to certain general propositions. Their development and execution are matters of detail. The aim of the article is attained, if it has helped to impress upon the reader this lesson, partly social and partly political: Take care of the children, and the men and women will take care of themselves.



## PLEASANT NAMES FOR PLEASANT PLACES.

Address before the American Geographical Society, 1884.

WE have passed lately through the season of college commencements. Each had its score of orators, who searched far and wide for subjects interesting to their hearers, but none of them thought of stooping to a subject so trivial in their eyes as the names of places around them. And yet these were not really trivial matters. We have much to say of the fitness of things in general; why not, then, the fitness of names to the things named? For our part, thinking the subject one of consequence, of much consequence indeed, we have taken it for a few observations.

Our happiness depends a great deal upon the places in which we live, and the pleasure or pain they give is affected by the names we know them by. We are told that Hood went to a school kept by two maiden sisters named *Hogsflesh*. They had a sensitive brother, who was always addressed as Mr. H. He was right. Yet one would sooner receive a letter addressed to him as *Hogsflesh* than one addressed to him in *Hogspen*. But even this is not the worst of all possible names, for there is a town in Arizona named *Tombstone*, which is worse.

Milton, describing the fabric raised by the fallen angels, exclaimed that—

“ . . . not Babylon,  
Nor great Alcairo, such magnificence  
Equaled in all their glories, to enshrine  
Belus or Serapis their gods, or seat  
Their kings, when Egypt with Assyria strove  
In wealth and luxury.”

What would he have said had he been told that, on the other side of the sea, the name of the Assyrian capital would one day be assumed by a straggling Long Island village, or

that a new settlement on a low, muddy tongue of land, thrust out between the Ohio and Mississippi, would be named after the seat of Egyptian kings? And, as if to lose nothing grandiloquent from the land of Egypt, a Memphis has been established three hundred miles below. Who, looking upon it, would ever ask another looker-on if it did not remind him of "Busiris and his Memphian chivalry"?

Let us come nearer home, and look at the map of New York. On the shore of a lake famed for its beauty the State has established an agricultural college. The place enchants you. You ask its name? Ovid! You are disenchanted. At the head of another lake lies a pretty village, the seat of a university. Nothing can exceed the beauty of the landscape; stretching to the north till the glance of the lake meets the blue of the sky on the far-away horizon, and on either side the land binding the water with a rim of emerald; hill and meadow, cape and bay commingled, in one scene, never to be forgotten. By what freak of idiocy was there misplaced upon this inland settlement, hundreds of miles from the sea, a name which for forty centuries had been associated in the minds of men with the immortal song of Homer, the island-kingdom of Ulysses, and the fortunes of Penelope and Telemachus? As a false label attached to the finest fabric will repel, however attractive the work may be, so here the lavish gifts of Nature and the generous endowments of man are alike depreciated by the superscription they are made to wear. We may admire, as we will, the beauty of the landscape; we may respect the university whose doors are open for man and woman alike, but the misnomer will nevertheless intrude into our thoughts, do what we will. That inexorable law of consequences, one form of which is that the sins of the fathers are visited upon the children, has here a fresh illustration, insomuch as the teachers and scholars of this century, for the faults of the last, are made to suffer the mortification, and not a slight one it is, of being obliged to stamp upon every letter they write, every report they make, every book they publish—**ITHACA!**

The traveler on his way from New York to Niagara passes three greatly prospering but greatly misnamed cities—Troy,

Utica, and Syracuse. There were Indian names enough at hand, sprung from the soil, spoken for ages by the aboriginal inhabitants, but they were cast aside for an alien nomenclature, which is as much out of place here as the sculptures of the Parthenon are out of place in a London museum. Who has not been moved by the pathos of Red Jacket when he cried out that the tears fell from his eyes "as the drops of rain fall from the tops of the trees of Oneida"? Substitute Utica for Oneida in this passage, see how it looks and hear how it reads! It is poor compensation that Oneida and Onondaga have been taken for the names of counties instead of the fair cities to which they of right belong.

Central New York was a military tract—that is, a tract set apart for bounties to soldiers—and the tradition is that a pedantic surveyor-general of the last century took ancient names, at random, out of a classical dictionary to scatter broadcast over this new land! That may not be surprising, but it is surprising that they are retained by the citizens of this generation, by men of letters and taste, scholars and enthusiasts, and so much the more as this central region has universities, colleges, and academies not a few, some of which might perhaps withdraw their attention, for a while, from higher tasks to the humbler one of plucking these thorns and thistles from their own soil.

Let us look at the names, or some of them, in a group: Aurelius, Brutus, Cato, Cicero, Camillus, Diana, Fabius, Hannibal, Homer, Lysander, Minerva, Milo, Manlius, Marcellus, Ovid, Pompey, Romulus, Scipio, Solon, Tully, Virgil, Ulysses, Athens, Arcadia, Attica, Cairo, Babylon, Carthage, Corinth, Greece, Ithaca, Jerusalem, Ilion, Italy, Marathon, Pharsalia, Palmyra, Rome, Sparta, Syracuse, Scio, Smyrna, Sempromius, Tyre, Utica, Troy. So much for the old surveyor-general and his ancient names. See what his modern imitators have added: Amsterdam, Berlin, Bombay, Cuba, Chili, Denmark, Dresden, Dryden, Dublin, Edinburgh, Florence, Genoa, Geneva, Java, Jamaica, Junius, Lima, Lodi, Madeira, Malta, Messina, Milan, Naples, Norway, Ossian, Palermo, Parma, Paris, Potsdam, Riga, Rotterdam, Russia, Salamanca, Stockholm, [Sweden, ]Turin, Verona, Vienna, Volney,



Warsaw, Wilna. But we are weary of the recital and must stop.

It would not be difficult to find an agreeable name for every place in the country. Though the number of post-offices amounts already to fifty thousand, and the land is but half filled, good names may be found for all. There is, to begin with, the large supply of Indian names. These should by all means be restored, as many of them as possible, not merely because they are significant and musical, but because they would stand as memorials of the Indian races, so many of which have perished, while the rest are perishing day by day. The same great Indian orator whose name I have just mentioned, at a council held in Hartford, poured out his soul in this lament over the fortunes of his people :

“We stand a small island in the bosom of the great waters. We are encircled—we are encompassed. The evil spirit rides upon the blast, and the waters are disturbed. They rise; they press upon us; and the waves once settled over us, we disappear forever. Who, then, lives to mourn us? None. What marks our extermination? Nothing. We are mingled with the common elements.”

Is it not possible even now to restore, where they are all but lost, and to retain, where they yet flourish, the names which this perishing people gave to their homes and hunting-grounds, their rivers and hills? What memorial more fit, or more enduring, outliving brass or granite, than the words of their plaintive tongue lingering forever upon the hill-tops, the valleys, and the streams which they loved so well?

How musical their names generally were we know from those we have retained, as—Alabama, Algoma, Altamaha, Arizona, Cayuga, Dakota, Erie, Genesee, Huron, Horicon, Iowa, Idaho, Kanawha, Mississippi, Monongahela, Minnesota, Michigan, Milwaukee, Nebraska, Ontario, Pensacola, Santee, Saratoga, Saranac, Sonora, Susquehanna, Tacoma, Tennessee, Tuscarora, Wisconsin, Wyoming. The old names could be found in old histories, old geographies, old maps, town records, and even in novels like Cooper's. Village improvement societies are just the agencies for such work. Then a local object, mountain, valley, or river, might suggest a name, as Capetown, Longmeadow, Cherry Valley. So might the

name of a founder or prominent inhabitant be taken with an English termination, as Jamestown, Williamstown, Charlestown. But by all means avoid terminations that do not belong to our language. Banish "*ville*" altogether. It is not English, but French, and only French. It does not fit well with our names. Indeed, it disfigures whatever it touches, making the good bad, and the bad worse. That it should be taken so often is a mortifying proof of bad taste, or poverty of invention, or of stolid indifference. The passion for it is almost a disease, and the instances of its disfigurement must be counted by thousands upon thousands. What could be more dreadful than McGrawville? We would go out of our way to avoid passing through a place under the cloud of such a name! Our language is richer than the French, and it has words in plenty capable of being annexed as terminations to the names of persons or things. Thus, town, borough, field, ford, hill, vale, meadow, plain, can be made use of, some of them in two forms, as town or ton (Charlestown or Charleston) borough or burg (Goldsborough or Ogdensburg). Then there are the names of our own famous men, which might be taken without a termination, as Washington, Jackson, Lincoln.

If the people of a neighborhood are able to find no name in an Indian dialect, if none is suggested by a local object, or a person of local prominence, they have at least the wide domain of invention. They can invent at will, and give names which, however unmeaning, are at least musical. Elberon, at Long Branch, is an instance of happy invention working upon a local name. The owner of the site was Mr. L. B. Brown, out of which an inventive genius made Elberon, the sonorous name it now bears. Saltaire, in England, might have been compounded of the words salt and air, softened by a vowel termination. What we want is a name pleasant to hear. Generally, as we have said, we can find one that has a meaning and sounds well, but when that is impossible we can invent one which, if it has no meaning, has at least an agreeable sound. Among natural objects, the trees alone would furnish a considerable supply, as for example, the linden, out of which could be made Overlinden, Underlinden, Bylinden,

Lindenfield, Lindenfeld, Lindenhill, Lindengrove, Lindenburg, Lindenside. Or an Indian name could be varied by different terminations, as Oneida, Oneidan, Oneidana, Oneidanland. Out of Genesee, Geneseo was made. But, in the dearth of all else, invent a name out and out.

Far better this than to borrow from the Old World. Better take any mellifluous syllables and put them together, than plant Sempronius or Pompey in the green glades of America. From a few euphonic syllables an endless combination might be made, as any one will see who will take the trouble to try: for example, out of the five names, Altamaha, Cayuga, Monongahela, Susquehanna, and Pensacola, which have between them twenty syllables, a combination of these in all their possible varieties would furnish a storehouse of names, as Altama, Altayuga, Altahela, Cayuhela, Mononhela, Monoghela, Ongehela, Susquehela, and so on.

Can these uncouth and uncongenial names which disfigure the map and set the face awry be got rid of? Why not? It needs but the will, the way is easy enough. In this State we have already a statute authorizing supervisors to divide a town and make new ones. Why not enlarge this statute so as to authorize the voters of a town to change its name? Other peoples have made changes greater than any we may wish to make, and we surely can do as much as they. Names that were fastened for generations upon countries and cities have been changed. Byzantium gave way to Constantinople. Ancient and modern geography seem hardly to describe the same world. The maps of Europe are renewed almost as often as every quarter of a century. What has happened almost within our recollection? Poland has been contracted, extended, blotted out, replaced, and blotted out again. The Batavian, Helvetic, and Cisalpine Republics were constructed, and in a few years fell to pieces. The kingdom of Westphalia appeared for a while in the list of continental states, and vanished. Within the last forty years a new kingdom has arisen at the mouth of the Rhine, and retaken the old name of Belgium. All the maps of Europe that we studied in boyhood made the Don its eastern boundary; but, under the influence of Russian geographers, the limit has been



pushed eastward to the Volga, and an immense tract separated from Asia.

It is not fifty years since the continent which borders the Indian Ocean eastward was known as New Holland. It is now Australia. Van Diemen's land is Tasmania. The native nomenclature has been adopted for the islands of the great South Sea; Otaheite and Owyhee have disappeared from the maps, and Tahiti and Hawaii written in their places.

On our side of the ocean the peninsula next east of us was once Acadia. When it fell into the dominion of the Stuarts it received a new name from the country to which that house owed its origin. Upper Canada has become Ontario. Little York is now Toronto. We are, I hope, about to change the Territory of Washington into the State of Tacoma. Would that we could change New Mexico to Sonora, and New York to Manhattan!

What a name is New York for this queen of Western cities! Compare it with that which the Indian gave it, barbarian as we call him, Manhattan or Manahatta.\* Who for its euphony and its significance would not wish the old name back again? Who, that cares for such things, does not grieve over the incongruity of the present name with the place? Old York and New York are as unlike as possible; one a small inland city, the other the seaport of half the world. As the voyager comes in from the sea, beholding the amplitude of the haven, the beauty of the islands, the richness and variety of the shores, the two rivers which clasp the island city with a rushing of great waters; the buildings, and the ships; the great bridge hanging in the air above them all, looking from below like an arch of gossamer, but above trodden on its solid floors as if it were part of the enduring earth, and withal the abounding and exultant life that animates the scene, he is ready to exclaim: "O thou that art situate at the entry of the sea,

\* It should, perhaps, be mentioned that a recent writer, Mr. A. J. Weise, in his "Discoveries of America" (New York, 1884), derives "Manhattan" from the French word *manants*, or natives, first used by Verrazano, the discoverer of New York Bay and of the Hudson River, in April, 1524. *Manants* was corrupted by the later Dutch writers and explorers into *Manhats* and *Manhattes*, "from the name of the people who dwelt at the mouth of the river," says Henry Hudson in 1609, and finally became *Manhattans* (De Groot, 1625).



which art a merchant of the people unto many isles ; thy borders are in the midst of the seas ; thy builders have perfected thy beauty ! ” One thing only is wanting to the completeness of the spectacle ; the crown of a fitting name on the head of the imperial city. May we not hope that one day, when she joins hands with her sister city, as she surely will, she will retake the old and true name of the ever-bright island of Manhattan ?

It is not extravagant to say that there is not another country on the face of the earth disfigured by so many harsh and inappropriate names as our own. England has English words of Saxon and Norman origin. Holland has those which are wholly Dutch. France has her own, handed down from the Franks. In Italy and Spain the names are partly Roman and partly the gifts of invaders. Germany and Switzerland have names which are histories. Denmark and Sweden owe theirs—soft and musical they are—to the Goths and Vandals. And Russia, Poland, and Bohemia, harsh as many of them appear to us, have at least those which are significant to the Slavonic races. But here what an admixture of Greek and Roman, English, French, Italian, Slavonic and Gothic—a piebald map—a confused jumble of old and new ; as if there were nothing original, nothing appropriate to the soil, nothing that distinguished the mass of human beings who have taken possession of these shores and are spreading themselves over the land with the rush of an incoming sea-tide !

American literature, we do not for a moment doubt, has a future equal to the past of any country or age. Why should it not ? We are the heirs of all the ages, we have not degenerated in mind or body from the standard of our progenitors, and we have been placed by Providence in as fair a domain as was ever vouchsafed to the children of men, in the Old World or the New. Behold what a domain it is !—scenery in innumerable forms of land and water, landscapes less finished but more varied than those of England, great lakes, inland seas as they are, storm-vexed Mediterraneans of the West, rivers rivaling the Nile, wide prairies swelling with harvests, or smiling with flowers as they lie waiting to be taken for the use of man, snowy ridges of the central mountains, Alps added

to Alps, cañons dark and deep, through whose long abysses great rivers rush foaming to the sea, boundless forests, dim and lonely save as they are trodden by wild beasts or wild men with cautious footsteps, trees of the forest taller and older than the cedars of Lebanon, cataracts without an equal in the world, the Yosemite and the Niagara, and over all a pure, elastic atmosphere quickening the senses, widening the horizon, and lighting up the firmament with the flames of sunset or heightening the brightness of the autumn woods !

Who, not wholly insensible to Nature, can stand on a New England hill in the glow of an October noon, the blood bounding through his veins with the exhilarating air, while the clouds hang lazily along the horizon or move slowly across the sky, escorted by shadows from hill to valley and valley to hill, and the trees on the hill-sides and the plains vie with one another in their robes of scarlet, and green, and gold, or perchance in the evening twilight, when the witchery of Nature is the greatest, in the full flush of the gloaming, as the rosy air tinged with all the hues of the rainbow suffuses the west, and the air is soft and still—who can stand thus, surrounded by autumnal glory, without feeling as much assured, as if a prophet foretold, that the highest poetry would yet vie with the highest art to portray this resplendent earth and sky ? And what is to happen here will happen elsewhere, until every bright or wild scene shall have its chronicle and song, and the whole land be as rich in its literature as in its cities and harvests, from the Mount of Katahdin to the fountains of Sonora.

Turn, then, from the place to the people. If we are not permitted to praise ourselves, we may, nevertheless, boast of our fathers and their deeds. Look into their annals from the earliest settlements to the times nearest our own, to find history surpass romance. Their first emigration hither was, not for gain nor for conquest, but for a sentiment, and sentiment has carried the country through all the great crises of its history. For a sentiment our fathers defied the arms of England and won their independence ; for a sentiment they fought England again in 1812 ; and for a sentiment our last great war was fought, that Titanic struggle that shook the world ! The first-

comers, pilgrims and colonists, passed through perils of the sea to meet perils in the wilderness, but they held their own, as an advance-guard holds its ground until they who are to follow come on ; and so our forefathers held their ground until others came, and the little band, swelling with time, became a host and moved on from valley to valley and river to river, until at last they and their sons, and their sons' sons, subdued the land, built goodly homes, established commonwealths, and scattered their enemies from the rivers of Florida to the Plains of Abraham. They were not all from the same stock. The predominant element was certainly English, as the English took in the seventeenth century ; but there was also an admixture of Celtic, Teutonic, and Frank. Though they had the common purpose of making a permanent establishment in the New World, there were strong contrasts of manners between them—the Puritans of New England, the Dutch burghers of New York, the Quakers of Pennsylvania, the Lutherans of Delaware, the Catholics of Maryland, the Cavaliers of Virginia, and the Huguenots of South Carolina. The deeds and the lives of these people so contrasted in manners, but so drawn together by the magnetic force of common dangers and common purposes, form the richest of materials for song and story. The wild tales of those earlier times were carried from fireside to fireside, and preserved in many a legend. When the colonies became States and the States became a nation, though a blending of manners followed these changes, the same spirit remained, the same strength of arm and the same power of will. These elements and these circumstances have developed traits of character which must affect the literature, as they affect the life of a people, begetting fertility of invention, love of adventure, daring that does not hesitate and hardihood that never gives up, joined to a peculiar humor and an ever-active imagination.

Behold now thirty-eight commonwealths resting in peace after the storms of war, peopling the land acre by acre with each recurring day, building cities and pouring into the lap of plenty harvests such as were never before gathered by the hands of men. These influences, the stories of the past and the promises of the future, in the scenes we have described,



will serve to create and fashion a literature of the land. We have already given an earnest of what we can do. Irving, Cooper, Bancroft, Motley, Prescott, Longfellow, Bryant, Whittier, Emerson, Hawthorne, Lowell, Holmes, are harbingers of a great day to come. Let us hope that, in the cultivation of a taste for letters and the arts, a subject so little considered as that we have been discussing may never be lost sight of, but that our own beloved land, the land of so many memories and so many hopes, may not only bind our hearts to her by the love of country and the love of home, but make the home all the sweeter for the association of pleasant names with pleasant places.

## SPEECH ON THE RETIREMENT OF CHIEF-JUSTICE DALY.

Mr. Chief-Justice Charles P. Daly, having reached the age of seventy years, left the bench of the New York (city) Court of Common Pleas at the end of December, 1885. A meeting of the bar was held, at which the following speech was made by Mr. Field.

MR. CHAIRMAN AND GENTLEMEN: When we see a man of threescore years and ten wearing his faculties unimpaired, dwelling with satisfaction upon the past, enjoying the present, and looking carefully into the future, we congratulate him on his serene old age. And, if he has been as mindful of his public as of his private duties, helping to form and re-form parties, to make and unmake magistrates, and to shape the policy and the fate of that wondrous organism, the body politic, we call him a deserving citizen. If he has borne public office to public satisfaction, we commend him for the honorable performance of his duty to the commonwealth. And if the office has been judicial, and he has borne it long, and borne it well—so well, indeed, that no one blames, but all men praise him—we pronounce him thrice happy.

These conditions are fulfilled in the friend whom we are here to receive and greet on his descent from the bench. He has lived a manly and blameless life; he has been a faithful citizen of the dual republic into which he was born, that lesser republic, the State, and that greater, the nation, to which the State belongs; and he has discharged the functions of high judicial magistracy for nearly half a century without fear and without reproach.

This is not the place or the occasion for eulogy, which would be as unpleasant for him to hear as it would be unbecoming in me to speak; but the most fastidious taste would not refuse me the privilege of saying that there must be something remarkable in one who has had the rare distinction of having been once appointed by the Executive and five times

chosen by universal suffrage to the same high judicial office, who has walked unharmed over the hot plowshares of popular elections, and filled his station for nearly two-and-forty years—twenty-seven of them as the Chief-Justice—to the general acceptance of all our citizens. Some details of his life are to be mentioned by the gentleman who will follow me. I will say no more than that he had the great advantage of beginning without patrimony—actual or expectant. In the race of life he started free from the impediment which hinders so many of our youth; but he had a stout heart and a steady hand, and with these he went forth into the world. His first venture was on the sea, where he acquired that taste for travel and love of geography which have distinguished him since. In one of his voyages it was his good fortune to see the capture of Algiers by the French. Who of us would not have toiled hard to see the lifting of that curtain which had hung so long over the southern shores of the Mediterranean, and the opening of a new drama on the theatre of the Dark Continent? Returning from the sea to the land, he threw in his lot with the great and honorable company of mechanics, until the advice of a friend led him away to the law, where, as we all know, he has been an apt scholar and a great teacher.

Consider for a moment the nature of the judicial office. The judgment-seat has been accorded in history—both sacred and profane—the chief place of honor. The praise of the greatest of men was that he sat in the “seat of judgment.” If this was so in former days, how much higher has the seat been raised in our day and country! The ever-enlarging circle of civilization, the development of industrial arts, the strides of commerce, the accumulation of corporate wealth, and, above all, the subordination of the lawgiver to a written Constitution, as the supreme will of the sovereign people—all these have invested the office of judge with a dignity and power that the past never knew. What new responsibility do they not entail! What qualities of intellect and will, what laborious study, what patient forbearance, what self-control do they not require, and, I will add, what increase of danger do they not bring!

I appeal, then, to all who hear me, whether our friend has not earned that good name, that affluence of respect, which



by common consent he bears. He has held office by choice of the Executive and votes of the people. He has lived under the old dispensation and the new. His half-century of service is a long link in that endless chain of law which began with society, and will end only when society is dissolved. With what unswerving honesty, what quiet dignity, what honorable simplicity, he has discharged his great trust, we, who are his witnesses, can testify. Who has seen him indifferent to the duties of his place? None. Who has seen him turn to the right hand or to the left for any man's frown or any man's favor? None. Who has heard him discuss out of court what was to be decided in court? Nobody. Who has believed him to be moved in his judgments by any consideration but the law and the testimony? Not one. Let us, then, greet him as victor, coming to us from the arena—one who has honored himself, and in doing that has honored us.

(Mr. Field concluded by offering the following resolution for the consideration of the meeting, and it was passed unanimously:)

*Resolution.*—The retirement of Chief-Justice Charles P. Daly from the bench of the Common Pleas, where he has served for more than forty-one years, and presided for twenty-seven, appears to us, members of the Bar of the City and County of New York, a fitting occasion for expressing our respect for his private character and our commendation of his judicial career. To have passed safely for more than two-score years through the trials of judicial life, encountering meantime the ordeal of five popular elections, and leaving in the minds of all citizens the conviction that he has always administered justice without fear or favor, caring only for the law and the testimony, which he diligently studied—these things, combining with the uniform courtesy, patience, and impartiality which have characterized his entire course with the bar, have given him a place pre-eminent in our regards, and lead us to salute him with our most respectful homage as he descends from the bench of this tribunal. And, while we give him this salutation for the past, we wish him for the future long life and that happiness in rest from judicial labor which springs from one's own self-respect and a life well spent in the service of God and his fellow-men.

## NOMENCLATURE OF NEW STATES.

Address to the Committee on the Territories of the House of Representatives at Washington, February 15, 1888, on selecting names for two new States.

MR. CHAIRMAN AND GENTLEMEN : What I have to say will be brief, and in a very conversational style. Hearing that there were to be four States admitted into the Union during this Congress, among them the Territories of Washington and New Mexico, I was induced to do what I could to eliminate the names that I thought inappropriate for these two States. This is not a new idea with me. As to New Mexico, I thought of it and spoke of it years ago. I had a conversation with members of Congress, and Mr. Elkins, then a delegate, agreed with me that the name New Mexico was inappropriate and inharmonious. Various names were suggested. Mr. Ely, then a member of the Committee on Territories, fell in with the idea. Mr. Sumner was then in the Senate, and he was heartily for a new name. We did not think specially about the name of Washington Territory, because that region was sparsely peopled, and nobody thought of it as a new State. It was suggested that as to New Mexico we should go to the most beautiful names of the rivers, mountains, and tribes of that district—the Indian names. Among the tribes were the Comanche and the Apache ; names from these, among others, were suggested.

Now, the question is, whether these two Territories of New Mexico and Washington shall come in under the names they now bear. This is not a question that affects merely the people of those Territories—it concerns all of us ; for, when we admit another partner into the confederacy, it is of some importance to know how we shall address her. The names of these new States should certainly not be made to cause confusion. If there were no other reason than of being agreeable or disagreeable to the rest of the people of the whole country,

that ought to be sufficient for refusing to continue these names.

It has been said of the people of this country, and I do not think it is easy to deny the imputation, that we have shown in the naming of our States, cities, and towns, remarkable poverty of invention. The State to which I belong, and to which my friend Mr. Baker belongs, has names in the central counties which will forever make it next to impossible for anybody to write or think poetry about them. Some time ago I was traveling in western New York, and came across a sorry old horse, dragging through the mud a wagon-load of empty barrels. I asked the driver where he was going, and was answered, "To Pompey"! "Good heavens," I said, "can anybody live there?" I thought that, before entering such a place to dwell in, one must have abandoned all hope of feeling any sense of fitness or beauty—in fact, have become ashamed of himself. Why the people of central New York, people that have schools, academies, and universities, do not get rid of these abominations I can not understand.

I mention these names merely to illustrate and enforce what I have to say about the names of the new States.

What rule should be observed in the naming of places? The aim should be to find something appropriate and pleasing to the ear. To say that one should not care about the sound of a name is absurd; and yet, strange to say, most of the people who are accustomed to a name do not care at all what it is. Some years ago I had a correspondence with an eminent Southern gentleman, Mr. Gilmore Simms, about names, and he wrote, "I think that the people would just as soon have a country called Squash as anything else." Though this was an exaggeration, it illustrates the point I make. Think of the names of old countries which ring in our ears: Palestine, Palestina, Samaria, India, Egypt, Chaldea, Assyria, the Indus, the Nile, Athenæ, Constantinople, Stamboul, Carthage, Rome, Germania, Britannia, with hosts of others. What melody there is in the Greek names! There seems, indeed, to have existed a kind of sympathy between the language and the civilization of the Greeks, each acting and reacting on the other. If that be true, then the debt we owe to Grecian



genius must be divided with that we owe to the Grecian tongue. And shall it be said that we have nothing of the same sense of euphony and beauty?

What now shall we do for our own names? Here are two great States to come into the Union, to become partners in the sisterhood of States, to have their stars in our banner, and their own watch-words and associations.

Consider each of these Territories separately. New Mexico contains 122,580 square miles; more than half as many as either France or Spain. It is large enough for a kingdom—a vast region of highlands, with mountains from four to six thousand feet above the level of the sea. There are the remains of ancient cities built in the rocks; older than any work of man of which history keeps record. This is the magnificent Territory which you name New Mexico, because it was once a dependent province of Mexico. I think we may take it for granted that nobody will approve of that name for the new State. If you should approve of it would you call the people New Mexicans? What would you think of an American citizen announcing himself as a “New” Mexican, a Mexican made over?

This calling of a place “new” after an old one is a pitiable idiosyncrasy. When the English founded the first colony in the continent of Australia they called it New South Wales. Once I had the temerity to call the people of that ambitious colony “New South-Walers.” I am glad to see that they are moving to change the name, and the only question is what name to take.

The great island northeast of Australia has long been called New Guinea. The older name was Papua, and there is a disposition now to return to it. So the world does move, and changes of name are made. Now, when you are taking the step of admitting a vast country into our community of States, it is not a small matter what name it shall bear—a name which is to be applied for ages, as long as time lasts, and is to stamp the people of that country with a patril that they are to bear wherever they go in the world.

“What name would you suggest for New Mexico?” I may

be asked. Let me suggest the name of Montezuma. I think that would be appropriate, as a tribute to the memory of the unhappy prince who, if he still sees what is passing in this world, would find some consolation in beholding his name stamped forever upon a part of the great country over which he ruled when Cortes came to despoil him of his country and his life. Then, again, there is the name of Manzana, which is an appropriate and well-sounding name. When a Senator from the new State hears himself called the Senator from Manzana, he will not feel as he would to hear himself called the Senator from New Mexico.

If you should divide Dakota, pray do not call the new States North and South Dakota. One of the complaints I should make against Mr. Lincoln's administration is, that it gave the name of West Virginia to the new State. Why did they not call it Alleghania? Though I am a citizen of New York, as well as a citizen of the United States, I complain, and have a right to complain, of the name of West Virginia. You can get a plenty of new names for a part of Dakota. Formerly, when you took away a part, you called the part taken Wyoming.

Another very good name for New Mexico would be Guadalupe. It is a name appropriate and sonorous. When you read of the Treaty of Guadalupe-Hidalgo, you know that it was made on Mexican soil. A member of the committee asks, "What would you call a citizen of Guadalupe?" I answer, I would call him a Guadalupean. By-the-way, what dreadful work do we make of our patrial names! When I see the word Ohioan, I feel disgusted; so when I see Michigander or Vermonter. Our language allows soft patrial terminations for such names. Why not say Ohiese, Michiganese, and Vermontese? Was Columbus a Genoan? Halleck calls him the "world-seeking Genoese." Here are his lines:

"Thy summons welcome as the cry  
That told the Indian isles were nigh  
To the world-seeking Genoese;  
When the land-wind from woods of palm  
And orange groves and fields of balm  
Blew o'er the Haytian seas."

These sweet lines, or any others like them, would have been impossible if the patrial of Genoa had been Genoan.

Nebraskan, Kansan, Arkansan, Minnesotan, are the true designations of the citizens of those flourishing States, from whose names they are derived.

I have said enough, however, as I rambled along, to explain my views, and I give them to you for what they are worth. The name bestowed upon a child by his parents may have much to do with his future life. Sterne tells us of one of his characters who was christened Nicodemus, and who complained afterward that he was "Nicodemused into nothing." Pray do not Nicodemus into nothing one of our own States.

Now let us come to the Territory of Washington. There is, I am told, a liking among the people of that Territory for the name of Washington. That is natural—a great and venerable name. But the name is one thing, and its appropriateness to this State is another. If the name be a distinction, no one State is entitled to it above the others. The people of the Territory are not unanimous on the subject. I received a newspaper from the Territory the other day proposing another name than Washington. Why should you bestow that great name on an inappropriate place? Americans have shown, not too much appreciation of the Father of their Country, but too much of their own poverty of invention, in bestowing that name already on thirty-two counties and thirty-five post-offices. The naming of the Territory Washington tends to confuse geography and to confuse correspondence. How does it tend to confuse correspondence? It obliges you to write more words and exposes you to greater mistakes. If you address a letter to Washington, you must add "D. C." or "Washington State."

A friend told me this morning that he received once a dispatch informing him that he had a box of wine lying at Portland for him. The dispatch did not say which Portland; so, as he was in the West, he thought it must be Portland, Oregon, and he wrote there for it. He heard nothing until months afterward, when there came a box all the way from Portland, Maine, with many charges and broken bottles.

The name of the Father of his Country has been bestowed



upon this capital, and is the most appropriate that could be given. Here stands and will forever stand the obelisk rising to the sky in his honor, higher than any other monument in the world. Here let the name of Washington remain, resting alone upon this beautiful capital, by the side of his loved Potomac.

I am asked what name I would give to this Territory when it comes into the Union. I answer, Tacoma. Mount Rainier has, as I understand, begun to be called Tacoma. It is, I believe, the highest peak of the highest mountain-range on the Pacific coast. You can stand at Victoria, in the neighboring island of Vancouver, and look over a range of mountains hundreds of miles glittering in the sun. Then there is the name of Kalama, a good name. Yakima also is a good name. But I, for one, would prefer Tacoma.

We feel the spell of the mellifluous lines which describe a daughter of the East, "as on her dulcimer she played, singing of Mount Aora." Who can foretell that in some less prosaic age than ours, in those vast regions, "continuous woods" no longer, "where rolls the Oregon," some daughter of that new Hesperus may not sing in sweeter strains of Mount Tacoma? Certain it is that if "beauty is truth, truth beauty," the name of that marvelous network of land and water, which lies outspread between the great river and the great estuary of the West, should correspond in some degree with its scenery and its traditions.

## THE THEORY OF AMERICAN GOVERNMENT.

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THE village nestling at the foot of the hill, where I am now writing, contains a thousand inhabitants, and is the central neighborhood of a township of twenty-five hundred. The township, or town as it is called, lies among the hills of western Massachusetts, a thousand feet above the sea. It is six miles long and three broad, and is occupied chiefly for agriculture, there being only five or six small factories where cloth, paper, and machinery are made. The total value of property, real and personal, placed upon the tax-rolls is \$2,670,000, rated at about sixty per cent of its real value, which, therefore, must be near four and a half million. The taxes for roads, bridges, schools, and every other town, county, and State expense, amount to a little less than one per cent upon this assessed valuation. Thirty-nine persons only, including two sent to the State Insane Asylum, receive aid as paupers; twenty-nine of them but a partial support. The number of dwellings is 478, and of families about 500; so that nearly every family lives by itself, usually in a dwelling of its own—that is, a house with a garden, all owned by the head of the household. There is a public library of 6,000 volumes, where any resident may read as much as pleases him, and from which any tax-payer may without charge take books for reading at home. The number of volumes taken and retaken from the library during the year is 8,000, and not one has been lost in ten years.

There is a town-hall for town-meetings; there are five school-houses, one of them sheltering under the same roof a primary, intermediate, and high school, and there are five churches of different denominations—two Congregational, one Episcopal, one Methodist, and one Roman Catholic. The

schools are free to all, and books are provided for the scholars. A wooded hill is dedicated to the public as a pleasure-ground for all, rich and poor, young and old. The little community for its internal affairs is governed by the town-meeting, where every adult male who pays a tax, however small, has a voice—that is to say, the town-meeting is the legislative assembly of the town. It is convened twice a year, and as much oftener as there may be occasion, and disposes of town affairs. The chief executive officers are three selectmen. There are but three Federal officials in the town, and they are postmasters. The only State officials are six justices, three notaries public, and a deputy sheriff. The town is one of thirty-two towns in the county, which has a population of 74,000 and is itself a corporation, with corporate officers for the management of its corporate affairs, though there is never a meeting of the citizens of the county. The county is one of fourteen counties in the State, which has 2,000,000 inhabitants and a government of its own, and the State is one of the United States, which have a population of 60,000,000 and a common government of all.

The functions of these different governments are set forth in written constitutions and statutes. The township is invested with power—to grant such sums as are judged necessary for the support of public schools, for the relief and employment of the poor, the making and repairing of highways and townways, the writing and publishing of town histories, for burial-grounds, for the destruction of noxious animals, for necessary aid to disabled soldiers and sailors and their families and the families of the slain, for monuments to those who died in the service, for conveying pupils to and from the public schools, for procuring the arrest of criminals, for maintaining a free public library and reading-room, and for all other necessary charges arising in the town. The disbursement of these various sums of money, and the superintendence of the business for which they are granted, are functions of the town.

The cities are clothed with larger powers of municipal government. The government of the county is vested in county commissioners, whose powers are declared to be—to provide for erecting and repairing court-houses, jails, and



other necessary public buildings, for the use of their counties ; to represent their county, and have the care of its property and the management of its business and concerns in all cases not otherwise specially provided for.

The State, having been originally sovereign and as such joining the Confederation, retains all the powers of sovereignty not conceded by its own people to the common government of all the States, as expressed in the Constitution of the Union. The State government is divided into three departments—legislative, executive, and judicial. The first is vested in two houses, Senate and Representatives ; the second in a Governor, all being chosen annually, the members of the Legislature by districts, and the Governor by the whole people. The powers conceded to the United States are thus described in the Federal Constitution, a description of which I give in the very words of the instrument, because they have been so often misunderstood and so often misrepresented :

“ To lay and collect taxes, duties, imposts, and excises, to pay the debt and provide for the common defense and general welfare of the United States ; but all duties, imposts, and excises shall be uniform throughout the United States ; to borrow money on the credit of the United States ; to regulate commerce with foreign nations, and among the several States and with the Indian tribes ; to establish a uniform rule of naturalization and uniform laws on the subject of bankruptcy throughout the United States ; to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures ; to provide for the punishment of counterfeiting the securities and current coin of the United States ; to establish post-offices and post-roads ; to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries ; to constitute tribunals inferior to the Supreme Court, to define and punish piracies and felonies committed on the high-seas and offenses against the law of nations ; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water ; to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years ; to provide and maintain a navy ; to make rules for the government and regulation of the land and naval forces ; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions ; to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers and the authority of

training the militia according to the discipline prescribed by Congress; to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof."

The powers of this Federal Government are divided between three departments—legislative, executive, and judicial; the legislative consisting of the two houses of Congress, the executive of the President, and the judicial of the Supreme and inferior courts.

It would lead me too far from my present purpose to discuss more particularly the boundary between the national and the State governments. That is a subject so vast in its reach and so momentous in its results that it needs a treatise by itself. My aim now is to point out, if I can, the theory on which all American government, State and national, rests, without dwelling upon the partition of sovereignty between them, or even the ramifications of local rule, all which, like the trunk, branches, and leaves of a tree, make up the great figure, as it stands and sways to and fro in calm and storm, sunshine and shadow. For the present it is enough to say that the general idea of the State and Federal governments and of the relations between them is, that the latter has charge of the relation of each State with the others and of all with foreign nations; the former has charge of the relations between its own citizens.

This is a bird's-eye view of the little community which I began by describing, and of all the communities of which in successive gradations it forms a part. Judged by its results, displayed on so small a theatre, I should say that the political system of this little community is, with one exception, not necessary now to be discussed, as nearly perfect as it can be made. Every human being has shelter, clothing, food, and instruction; all adult males have a voice in the management of what is

common to all the people, and for the larger concerns which they have in common with the county, State, or nation, they have their representatives in every deliberative assembly.

How did all this come about? It came naturally. It was not imposed by violence, it was not effected by fraud. We know every degree of the process. Self-government is as natural in the New World as is chieftainship in the Old. We know every step in our own history. We know who first and who afterward came hither, when they came and whence they came, and what they did when here.

The settlements which most of all laid the foundations of American government were made in New England.

The first of these settlements occurred at Plymouth and the second in Massachusetts Bay. The Plymouth settlers, coming without royal patent or other authority than their own high resolve, when they were about to land, entered into a solemn compact with one another, by which, in the presence of God, they combined themselves together into a civil body politic, by virtue of which they were to enact such just and equal laws from time to time as should be thought most convenient for the general good of the colony.

In making this compact each man acted for himself alone and as the equal of every other man. Equality of rights, absolute equality, was thus the first principle upon which the new government rested. As other settlements were made in the Plymouth colony, each followed the example of the parent one, and, when a conference of the different settlements became necessary, delegates were sent chosen by the body of each community of settlers. The colony of Massachusetts Bay was formed under an English charter, but this charter intrusted the government of the colony to the freemen of the company without distinction. Thus it was that equality became the corner-stone in the foundation of New England freedom.

It were needless to trace the progress of this principle in the different colonies. In some of them there were exceptions, but the exceptions proved the rule. In taking for an example a township in Massachusetts, it must not be understood that the same system of local government existed in all the colonies. In its most perfect form it was found only in



New England. But in all the colonies there was some form of local government, sometimes in parishes or other small divisions. The general features were the same. When, therefore, the united colonies put forth the Great Declaration which proclaimed their independence of the British crown and gave the reasons for it, they put the equality of mankind at the head and front of their argument. "We hold," they said, "these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; and that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed."

This word "equal" is the pivot upon which the argument turns; the words "life, liberty, and the pursuit of happiness" follow from it; they are amplifications of the same general idea. For if two are equal in rights, neither can justly interfere with the other by taking away his life or restraining him of his liberty, or obstructing his pursuit of happiness, so long as such pursuit does not interfere with the equal rights of another.

This Great Declaration has been accepted from that time to this as a just explanation of the theory of American government. More famous and far-reaching than Magna Charta; for, while the work at Runnymede concerned only the people of England, the work in the Pennsylvania hall concerned all mankind, the declaration was welcomed with rejoicing as the signal of deliverance from the despotisms of ages. It has gone the circuit of the world, outlived dynasties and revolutions, and is as full of life to-day as it was in the dark days of 1776.

But why this recital? Is it not commonplace? Have we not heard it all before? Yes, indeed, it has been heard a thousand times, repeated in school-books, declaimed by school-boys, read out by Fourth-of-July orators from platforms innumerable. But has it been believed? Has it been accepted in its full significance? Commonplace it may be to scholars and thinkers; but to many a declaimer, ay, to many a legislator, it must sound as new and strange doctrine.

Let us, however, not make the mistake of confounding



cause with concomitant, the reason of government with the conditions on which it should be founded. Equality is not an end, but a means. If each person stood isolated, though he were the equal of every other person, he would be useless and miserable. Equality of itself will not insure happiness. That is obtained by pursuit. It is not the province of government to promise happiness to any one. That he must seek for himself. His right to the pursuit is defended by government. The great men who formulated and proclaimed the Declaration of Independence knew very well on what foundation a state should be built, for they were themselves representatives of political societies long established, which had administered justice, mustered troops, and engaged in many public enterprises. They knew as well as we know out of what instincts and for what ends governments had been maintained in the colonies for nearly two hundred years. When, therefore, they spoke of equality they spoke of it not as an end, but as a means; not as the reason for having a government, but as the only just condition on which it was to be had and enjoyed. They meant that governments were instituted for the protection of life, liberty, and the pursuit of happiness, and that preliminary to all was the great primal truth that these several functions were to be exercised with equal reference to all the inhabitants of the state. The theory is set forth in their own words—not in some of them only, but in all. Knowing the rights to be secured, we know that the means to secure them are: Just and equal laws, the administration of justice, the public defense, the education of children, the construction of public works necessary for the common service, and the care of those feeble members of the state who are unable to take care of themselves. If there be any means of securing men's rights other than these, I know not what they are. There is no occasion to revise the formula of the fathers. It is as true now as it was when it was first proclaimed. That generation has passed away, other generations have appeared and departed; old dynasties have been overthrown and new ones established, peoples have been divided and reunited, but the same truths remain; events do not alter them, time does not make them dim; they shine like the stars

of the firmament, unchanged and unchangeable. Here is the American political creed. The rights for which government is instituted are set forth; the condition of ample enjoyment is given and the means are shown. Let us consider these means a little more closely, to see how they may be best enjoyed by adhering to the condition of equal rights for all.

Nobody here doubts the wisdom of just and equal laws. When it is said that laws are to be enacted for the common good, it is not meant that there is a common store of good, distinct from the separate share of each individual. If a measure were certain to make half the individual members of the state five times richer than they are, and the other half poorer by one fifth of their substance, the sum total would be nearly sixfold what it now is; but the measure, after all, would be robbery of half the people to enrich the other half.

So, too, of laws for the public defense; they may be perverted into instruments of injustice. A navy-yard, for example, placed not where ships can be best built and easiest sent to sea, but where jobbers want contracts and politicians want votes, would be a yard with a double aspect—one for defense and the other for plunder.

When we find ourselves perplexed by contradictory theories or measures, it is useful to go back to first principles. The proper place of charity in the functions of government is a subject for careful discrimination. The end of government is not the development of man's social nature, but the maintenance of his rights—the rights which God and Nature gave him. His social nature develops itself, or is best developed by the affections and those ties which bind every man and woman born into the world. Government is a political machine, not a charitable institution. Association in political society is a different thing from association for companionship. The companionship of man and wife, for example, is an ordinance of Nature, because each is imperfect without the other. This leads, of necessity, to the association of parent and child, and the multifold relations of kinship. These relations, however, weaken as they widen, and become commingled with like relations crossing in different directions. A father of a family sees his children and his grandchildren clustering

around him, but they entwine themselves also with the descendants of other parents and grandparents, and the identity of blood is lost in two or three generations.

So the relations which arise from affinity or consanguinity may be left out of view when considering relations that are political. Every man feels the necessity of some association for the better development of his own individuality. He needs the aid of his neighbor for defense against evil-disposed persons, hence a union for common defense; he needs a road from his dwelling to one at a distance, and hence agrees with his neighbor that they should build one together; he must cross a river, and, being unable alone to build a bridge, he unites with another to build it; and so in other enterprises for the benefit of many, which the many must undertake in common. The aim, however, of all these common undertakings is the same—the benefit of the individuals who join in them. The danger of public works is favoritism to the few at the expense of the many.

The tendency to govern too much has in most governments no counteracting force to set against it, and only when those who govern and those who are governed are identical can the tendency to govern overmuch be overcome. In an unlimited monarchy the counteracting force is fear—the fear of encountering resistance. The autocrat has only to wish and to gratify his wishes, except that Nature sets bounds to his desires on one side, and fear of going too far interposes on the other. In a limited monarchy, the number of those who govern is multiplied, and, as they are also among the governed, they restrain themselves to the extent of protecting their own interests. Thus it has happened, in countries where the power is in the hands of the landlords, that the laws favor the landed interests. When, however, all have a hand in making the laws, they will be made for all, unless the general movement is obstructed or deflected by interested combinations.

Experience shows us that there is an ever-pressing tendency of majorities to exert their power, and thence arises the necessity of an ever-vigilant watchfulness to restrain them. Two maxims are often heard in arguments about governments: one, "That which is best administered is best"; the other,



"The best government is that which governs least." Both contain some wisdom, but neither is altogether true. A bad government may be faithfully administered, and yet, from defects in its constitution, it may work a great deal of harm; it may attempt to do too much; it may be obliged to do more than ought to be done by any government. For example, it was for a long time, and may be still, the system of France that a mill can not be run without a license from the central government. In the administration of this Government the license may be prudently and justly dispensed, but the rule that requires a license at all is a bad one. So, with regard to the other maxim, a government may do too little; it may neglect to make adequate provision for the dispensation of justice or for the national defense. It is true, nevertheless, that a just application of our political creed would exclude very much of our legislation. The true end of government is to secure men's rights, not their fortunes or their pleasures.

The justification for any public enterprise is to be found in its tendency to secure some of the rights for which government is instituted. Every one of the eighteen clauses in which the powers granted to the Federal Government are expressed rests for its justification upon the principle I have stated. And, though there be this difference between the Federal and the State Constitutions, that while the former enumerates the powers granted, the latter enumerates the powers withheld, there is implied in every State Constitution a limitation of State power to the protection of the rights of the people. I do not say that an act of a State Legislature, not prohibited by the Federal or the State Constitution, might be declared by the courts to be invalid. The powers of the State judiciary may in this respect be limited to declaring the inconsistency between two expressed laws and upholding the greater as against the less. But I none the less affirm that an act of a State Legislature, which goes beyond the protection of the rights of the citizens and the sanction of those public enterprises which, being beyond the power of the individual, are really connected with his protection, passes the just limits of government as measured either by the lessons of reason or the precepts of the fathers.

There are two theories of government, the liberal and the meddlesome. Their limits are easily marked, if we follow the principle we have been considering. My life, my liberty, my pursuit of my own happiness, are my inalienable rights. So are those of every other person. That all these may be enjoyed together, in harmony, is the aim of civil society. But insomuch as there are many works which would promote individual happiness, to which, however, the abilities of one alone are unequal, many individuals unite in an enterprise for their common benefit. A road, as I have said, is one instance. Savages have no roads, or next to none. One finds his way in the wilderness, over plains and hills, and another, seeing the traces of his footsteps, follows, and a path or trail is made through the forests or over the prairie. A civilized society makes a road, because a road is a convenience to every traveler, and all of them unite to survey and make it. This is but a sample of many works useful for the public—that is, for the individuals who compose it—and therefore undertaken by the public. The individual is always the object in view. His protection in the full enjoyment of all his rights is the great object of all laws, of all institutions. Whenever society attempts to do more than this, it oversteps its proper boundaries. So certainly is it a law of our nature, that we should not pass these limits; all history teaches us that, wherever we do pass them, we suffer sooner or later. The meddlesome theory leads to irritation, failure, reaction. Most certainly we promote our own individual happiness best when we mind our own business most.

There are many reasons why public charities should be watched. The temptation to feign distress is so great, the weight of idleness is so heavy, the pretense of helplessness is so common, that when the state interferes it does so for the most part in a manner so imperfect and with such wasteful extravagance that one could almost wish it were not undertaken at all. Yet food, clothing, and shelter must be provided for those who want and can not by their own efforts get them. Why we provide them is because a sympathetic nature has been implanted in the human soul. We can not see a drowning man, but we rush to the rescue; we can not look upon a

burning building without striving to save the inmates; the monks of St. Bernard live in regions of ice, that they may help the way-worn and bewildered traveler. While this is our nature, and we yield to the impulse, our faculty of reason admonishes us that the necessity is at once the cause and the limit of interference. No man should be helped who can help himself. Self-help is the best lesson for the poor and rich alike to learn. No great character was ever yet found without it, and with it few there are who fall by the wayside.

The administration of justice is of primal necessity in all social organizations. To be equal before the law is the aspiration and the aim of man under governments the most diverse. Some one has said, and I think it was Hume, that all the machinery of the state, all the apparatus of the system and its varied workings, end in simply bringing twelve good men into a box to decide upon their oaths. To be equal, the administration of the law must affect all alike, must be equally within the reach of the poor and the rich, the weak and the powerful, the friendless and the befriended, and equally open to the knowledge of all.

The education of children and the care of those who are destitute are clearly within the scope of equal government; the reasons for them are not merely economical, they are vital. Self-preservation requires them. By education I mean only such culture of the mind and such an amount of learning as will teach all learners their duties and their rights, and make them capable of holding their own in the world.

The strongest of all the seductive influences which lead men astray from the simplicity of the early faith, and the frugality of the early times, is the tendency to extravagance in public expenditure. In devising the means of levying the largest contributions in order to fill the treasury, and then of emptying the treasury that it may be filled again, the tempter and the tempted vie with each other.

Having thus discussed the means by which the rights for which governments are instituted are best secured, let us recur to the condition on which all these means are to be used and these rights secured. What is meant by equality? Men are not equal in stature or in strength of body or mind, or in



genius, or in elevation of spirit. There has been but one Shakespeare, but one Washington. Equality means equality in rights, in the right to live, the right to be free, the right to pursue one's own happiness, in his own way, without constraint from another, and, as a necessary consequence, equality in all those agencies of government by which these results are accomplished. The individual stands alone before his Maker. He came into the world alone; he goes into the grave alone. "We brought nothing into this world, and we can carry nothing out." While we are here, we stand each by himself, accountable to God alone for the inner life, and to our fellow-men only so far as we infringe those rights which they have in equal measure with ourselves.

Were there occasion to fortify the lessons of our history and the teaching of the fathers, by reasoning from man's nature, it would be easy. Self-knowledge and self-control are the hardest of all tasks. "Know thyself" is the precept of ancient sages. If self-knowledge and self-control be so difficult, how much more difficult are the knowledge and control of others! What person is there who should not say to himself, what candid person is there who would not say: "I am ignorant and weak, I can see but a step before me; I thought one thing last year, I think a different thing this year; I was headstrong yesterday, I am irresolute to-day; how then can I, so weak myself, be strong enough to control another? If I can not wisely govern myself, how dare I attempt to govern my neighbor?"

There is no more fascinating study than to trace to its logical consequences this great doctrine of equal rights. The first of these consequences is religious peace. The belief in equal rights relegates to the domain of conscience that which should never have been admitted within the domain of government, and lifts from the world the dark and heavy cloud which has hung over it like a pall from the beginning of human records. The assumed insight into the unseen world, the dreadful power to bind or to unloose the souls of the departed, the propitiation of good and evil divinities, which the priesthood so long arrogated to itself, when supported by the secular arm, filled the world with terror. Whether the rights were

celebrated by Druids in British forests, or by priests offering human sacrifices in Mexican temples, or by bishops in grand cathedrals, the spirit of domination was the same. It cost ages of cruel strife to implant in the minds of men the belief that the relation between each of them and his Maker was a personal relation, within whose sacred precincts no other man was privileged to enter. The equality of men was the foundation on which the belief came finally to rest, and, that equality being once established, the sword fell from the girdle of religion and the robe of peace took its place. It is the reasonable and lofty boast of this, our country, that it has made religious freedom a reality at last, and established in our Federal Constitution the immutable decree that Congress shall "make no law respecting an establishment of religion or prohibiting the free exercise thereof," and the like in our State Constitutions, that of New York containing these memorable words: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State to all mankind." Wherever now, and in all time to come, the standard of the republic is floated, there is and ever shall be religious peace.

The next consequence of the belief in equal rights is its antagonism to the theory of hereditary government—a theory which has spread itself over the older continents save here and there a few heroic exceptions, as for instance behind the defenses of the Swiss mountains. What could be more absurd than the superstition that wisdom descends from father to son, in endless succession, unless it be that other superstition that the weak son of a born ruler could govern better than the elect of the people? Both these superstitions have gone down, in the New World at least; for in all the vast domain which the foresight and daring of Columbus revealed to mankind, there stands not an hereditary ruler outside of the Empire of Brazil; while a hundred millions believe in equal rights against twelve millions who do not. I leave out of view the colonies which still remain subject to European thrones. Think of the uproar with which the world has resounded in the struggles of rival chieftains, from the first battle on the plains of Asia to the last raid of Don Carlos in the fastnesses

of Biscay; of the dungeons that have resounded with the cries of imprisoned patriots; of the fusillades and the scaffolds which have made the world red; of the implacable hatred with which a revolt against a dynasty has been pursued, and punished after it has been suppressed! Count the assassinations of heirs to thrones, and the cruelties of pretenders to thrones; and then think what the abandonment of hereditary government may do for the world.

Still another logical consequence of the belief in equal rights is the overthrow of privilege. Of all the forms of oppression with which the spirit of evil has afflicted mankind the greatest is privilege. It has stolen slaves from the coasts of Guinea, divided into castes the millions of India, built up the gigantic monopolies which fetter the industry and commerce of the world, and given birth to those swarms of lesser immunities which darken the land, like the cloud of locusts that came up on the east wind into Egypt, and ate every herb of the land and all the fruit of the trees. Freedom to labor in any form of handicraft, to till the land, to engage in any calling, to buy or sell, when, where, and how he may, is the birth-right of every human being, derived from the Almighty, and, however some may revile it, victory will come over to its side at last, and the hosts of monopoly great and small will be driven away into outer darkness.

A further consequence of the belief in equal rights is the stop which it must put to the career of conquest. The past history of the world has been a history of invasions, cruel and causeless invasions, one king warring against another king to get away his subjects, with no more regard to the rights or the wishes of the subjects themselves than if they were so many cattle grazing in the pastures, to be sold at the caprice of the owner, or stolen by the first and strongest robber. With the fall or the right of conquest would melt away the armaments by which the Old World is trodden under foot—armaments which are never marshaled but to conquer or to resist conquest.

Thus has it been my aim to show in its just proportions the theory of this our American government, to recount the rights which it guarantees, and the means by which the guar-



antee is to be secured, and to show how there runs through all the idea of equal rights, with its softening and warming influence to smooth the way and lighten the burden of all the children of men.

This is our ideal commonwealth, as we love to see it, in the histories of early times and the Constitutions of the States and the Union: a true democracy; not a wild, untamed, disorderly democracy, but a democracy of order and of law. It is not necessary to such a form of government that the people should act in mass, as they may act by delegation in all but their primary assemblies. The principle and the effect are the same. The formula of the Constitution of New York expresses in just terms the theory and the practice: "The people of the State of New York, represented in Senate and Assembly, do enact as follows." In no other way than by delegation can the collective will manifest itself in a populous state. The people can not in general assembly enact the laws, or hear evidence and decide upon law or fact, or chase a fugitive, or inflict punishment. They act by their agents and signify their choice by the innumerable leaflets, no bigger than a linnet's wing, which decide the destinies of states. There is a too prevalent notion that in proportion as officials are elected by direct votes of the people in that proportion the government is democratic; or, to express it differently, the more election the more democracy. This is a mistake. The most democratic of the old governments was in Connecticut, and there the freemen elected annually the Governor and the Legislature, and the Legislature appointed all the magistrates, judicial and executive, from the judges and sheriffs to the justices of the peace. Before the last revision of its State Constitution the government of Massachusetts was administered by a Governor and Council elected annually by the people, and by a Senate and House of Representatives elected in the same way and for the same term, and the supreme judges and other officials were appointed by the Governor and Council, the judges for life, and the other officials for fixed terms of office. Now many of the executive offices are filled by popular vote. But the State government is no more democratic than it was before, and no better administered. Connecticut

as I have said, was no less democratic in the old days than it is in these, when the members of the Legislature are elected for two years, and hold biennial sessions, and the judges are appointed by the Legislature for long terms of office. The experience of New York is full of significance. When first adopted the Constitution of the State provided for filling by popular election the officers in charge of the canals and the State-prisons. The Constitution has been amended, and both these branches of administrative service are now filled by the Governor, on the advice of the Senate. If the truth must be told, the filling of so many administrative offices by popular election tends to weaken the hold of the people upon these offices, by distracting the attention of the electors and smuggling into place unknown and incompetent holders.

There are some Americans, I am sorry to say, not very many I hope, but ignorant and noisy, who repudiate the principle on which the government of their country is founded, scoff at the inalienable rights of man, mistake the abuses for the uses of our institutions, and think and speak of Enrope as a fairer land with more benign institutions. These are illegitimate children of the republic. They labor in vain. The doctrine of equal rights for all the children of the common Father will not be shaken till the earth trembles to its foundations.

Such is the theory of American government, that ideal of American democracy, which I set about to give. I have confined myself to this ideal. I have not attempted to show wherein or how widely the practice departs from the theory; how much, if at all, the real lags behind the ideal. I have endeavored to portray this ideal as it yet lingers in tradition and may be traced in the pages of the fathers; the ideal of a self-balanced and self-governed state, where every man stands erect in the fullness of his rights, and the pride of his manhood, neither cringing nor overbearing, owing no allegiance but of duty, claiming none but from the heart, fulfilling every service and exercising every right of the citizen. This, I am fain to think, is the true ideal of American government—a government founded not on the traditions of remote ages, not on usurpation, not on conquest, but on things older and firmer than all—the equality and brotherhood of men.

## MEMORIAL ADDRESS ON PRESIDENT MARK HOPKINS.

Delivered before the Alumni of Williams College, at Williamstown, Massachusetts, June 26, 1888.

MR. PRESIDENT AND FELLOW-ALUMNI: In the year 1819 three youths met for the first time in the academy of Stockbridge. Their ages were not far apart, and they were all in training for a college education. Their tastes were much alike; they were enthusiastic students, lovers of knowledge, and untiring in its pursuit. They soon became friends, and continued to be friends to the end of their lives. They went to the same college and afterward into different professions, but they always kept watch of one another. Of these, two died in maturest age, and I alone survive. The first to leave us was John Morgan, of whom I can never think but with deep emotion and admiration for his profound learning, his guileless nature, and his devout life. Long useful and honored as professor at Oberlin, he now sleeps by the shore of that inland sea which pours its waters over the cliffs of Niagara. The second, Mark Hopkins, descended into the grave two years behind his comrade, and he sleeps here under these waving trees.

The manner of his death was more remarkable even than the life which it ended. He had passed the day before pleasantly, had driven out at twilight to take the evening air, stopped to drink at a familiar spring whose waters were especially pure and sweet, had returned to his evening meal in the quiet of his home with only his wife beside him, and retired to rest as he was wont to do. The next day, the day of his death, he remained indoors, being a little restless. During the night he became more restless, rose from his bed, and took two or three turns in the room, and then, seating himself in a chair by the side of the bed, said to her who had been his



constant companion for more than fifty years, "This is a new sensation—I think it must be death," and, without lying down or saying another word, fell quietly into the sleep of death. Without a pang, unless the momentary restlessness be deemed a pang, and without other warning than such as I have described, his soul passed out of the world that he had served so bravely and so long.

It was fitting that he should live a long life for the finishing of his work; it was fitting that he should die in June, when the day was longest, the air softest, and the flowers of forest and field richest and sweetest. He was a lover of Nature, and, if he could have chosen his time to die, I think it would have been when he could lay his head upon the lap of his Mother Earth in the gentlest and brightest hours of the year.

It is a little more than a twelvemonth since I heard beyond the sea of the sudden death of this eminent man, my life-long friend. I could not look upon his face as he lay in death, I could not follow him to the grave, but my love traveled swifter than light, and with my mind's eye I saw him laid to rest amid the scenes he loved so well.

When I reached my home after months of absence, I was honored with a request from the trustees of the college, his college and mine, to tell them what I knew concerning the person and the life of this greatest teacher of his generation—a life that had been so good and so great, and had come in its fullness to so sudden an end. In accepting the invitation I not only perform a duty laid upon me by the generous confidence of these guardians of the college, but I pay what tribute I can to an exalted character to which we all owe so much. It is to be hoped that the whole body of the alumni, a great company scattered over different parts of the land, will erect a fitting memorial of this their foremost man—a memorial that will not pass away like my winged words, but stand on foundations of stone through coming ages.

How can I portray this character and this life? The life was uneventful. Our friend did not serve in the councils or the battles of his country. He was a leader, but his leadership was silent; he impressed himself upon his generation,

but the impression was gentle; he was a thinker, but his thoughts were uttered not in passionate words, rushing like a storm, but in calm language, like the soft-falling words of Ulysses, which fell as fall the winter snow-flakes through the still air.

Let us in imagination place him before us, as we have so often seen him in this church, walking up the aisle or sitting on this platform; tall, thin, wiry in shape and motion, slightly bent, with broad shoulders, an ample forehead, and a mild hazel eye. With this venerable and beloved figure thus present, let me briefly describe his life and work.

There are few men of whom it can be said that they produced distinct currents in the movements of their generation, and whether he was one of these can only be determined by the generations to come, but we may already claim that he impressed himself so strongly upon hundreds of young men who came within the range of his oral teaching that they diffused their impressions upon thousands and tens of thousands of their countrymen, and that by the solidity of his character and the influence of his writings he added immensely to the strength of the moral and religious sentiment of his time, and, furthermore, that he opened in some directions new views of great truths.

If I should seek to express in fewest words my idea of President Hopkins as a teacher and writer, I should say that he was a Puritan teacher and philosopher. He was a Puritan by birth and by education. The Puritans have so often been described that it should seem superfluous to describe them again. Macaulay mentions the simplicity of their dress, their sour aspect, their nasal twang, and their stiff posture, their long graces at table, and their Hebrew names; but these were certainly not peculiarities of all the Puritans, and even where they existed they were often counterbalanced by many great qualities and virtues. Extravagance and excess are not infrequently the outcome of high fervor when unaccompanied by self-control. The Puritan was a sincere and God-fearing man, who made the Holy Scripture his only rule of faith and practice, and believed in a special Providence controlling all the affairs of life. Sincerity and faith were his characteristics.

In these respects Hopkins was a Puritan. The Puritanism with which he was imbued was not the Puritanism of Charles I's reign, when large masses of the English people were uneducated, but the Puritanism of New England in its best estate, where every man was instructed in the common branches of learning, studied for himself the Bible and other religious works, debated and voted in the town-meeting, and knew very well the civil polity of his State. The life of a Puritan was fashioned after his idea of his relations with his Maker. He was heart and soul dependent upon the All-wise and the Almighty, and all that he did, with all that he thought, was interwoven with that great idea.

The township in which President Hopkins was born was an example of Puritanism in its most pronounced but in its most attractive aspect. Nestled in the mountains, amid scenery varied and enchanting in all its variety, it was inhabited by farmers, each one holding his acres in fee and each as nearly independent in his outward circumstances as it is possible for man to be; looking up to God in morning and evening prayer, thanking him at every meal; frugal without meanness; begirt with sons and daughters educated in the common school, and all helping in the labors of the farm and household. Intermixed with these were a few families of higher culture and graceful manners, who served to throw a charm over the little community. From all dwellings, high and low, there met every Sunday a procession to the meeting-house to hear the minister and discuss the sermon afterward, all regarding him as the first man in the township, the lawyer and squire as the second, and the doctor as the third. This township, as I have said, presented at the time of Hopkins's birth the best example of a New England Puritan community. Such men were they who, when the hour struck for resistance to tyranny, stood forth manfully for their firesides and their altars, "fired the shot heard round the world," and finally wrought out that marvelous scheme of self-government which has already spread itself from sea to sea, and is silently making its way by force of example to the dominion of mankind.

Having said thus much of President Hopkins as a Puri-



tan, let me say something of him as a philosopher. Milton, in the "Comus" makes one of his characters exclaim :

"How charming is divine philosophy!  
Not harsh and crabbed, as dull fools suppose,  
But musical as is Apollo's lute."

What, then, is philosophy, in its first and truest sense? It is not merely love of knowledge, as its etymology indicates, but the love of knowledge and the active pursuit of truth in all its forms. The highest branches of philosophical studies are those which embrace moral and mental phenomena. President Hopkins was a philosopher in each of these senses: he studied and taught intellectual philosophy, as few men have studied and taught it; he also studied and taught moral philosophy, as hardly any man of his time has done.

The phenomena of the mind, that mysterious agency which no man can explain and no man comprehends, and which we know only by its subtle phenomena—to those phenomena he applied his most discriminating and vigorous intellect, with such results that few of his contemporaries understood them so well, or discussed them so intelligently. But it was in the domain of moral philosophy that his mind made its greatest effort, and reached its highest success—that philosophy which teaches the relations of man with God, and of man with man and other existences higher and lower, of all subjects the greatest in dignity and aim.

His studies were marked by the simplicity and truth which pervaded his life and affected all that he did and all that he thought. With the exception of the Bible, whose authority he never disputed, he was emancipated from all authority, and thought only for himself and by himself. He disdained all sham or tinsel, all subterfuge or equivocation, and looked steadily through the best light at whatever object he sought to know. The directness of his methods was as remarkable as the indirection with which many men pursue what they seek. And the simplicity and clearness with which he explained what he knew were almost as pleasing as the truth which he expounded. There was never any pretension in his manner or his language. His life was a standing lesson of

simple truth, and his opinion and counsel were lessons of wisdom enlightened by study and experience.

If it should be said that he lacked the poetic in his composition—in other words, that he lacked romance—I should reply that he had something better than romance. He was wedded to the reality of things. Yet he said on one occasion to a professor, “I too am a mystic.” But who is not a mystic? What reflecting person is there, who can look upon the firmament of countless suns above him, upon the earth beneath him careering through space at the rate of a million and a half of miles a day, bearing twelve hundred million souls, and then turn to his own body and soul, as mysterious as all things else, without feeling awed and bewildered, and ready to exclaim, “Great and marvelous are Thy works, Lord God Almighty!” All, all is mystery, what we are, whence we are, and whither we are going!

Truth, simple and unadorned, was the object of Hopkins’s affections. Far was it from his thoughts to teach logic to his pupils that they might acquire the power to “make the worse appear the better reason, and perplex and dash maturest counsel,” but he taught them the best way to reason, that they might find out the truth and maintain the right.

As a teacher, he was simply incomparable. General Garfield, at an alumni dinner five or six years before he became President, said he would rather be taught in a college where Mark Hopkins was teacher, though the buildings had nothing but pine slabs to cover them, than in the best endowed university of the country under ordinary teaching. This, though exaggerated, was the expression of an opinion formed after his own experience at Williams, and his observation of other colleges. The highest art of the teacher is to make the pupil not only learn, but think and reason. President Hopkins, in explaining a subject to the student, had the rare faculty of making him not only listen, but think and ask questions, until pupil and teacher found themselves engaged together in the ever-fresh pursuit of truth.

Agassiz desired that the word “teacher” should be engraved upon his tombstone. Of all offices and titles that of the teacher is the most honorable, for out of it grow all others.

It imparts knowledge and creates character. Beginning with Socrates, Plato, and Aristotle, and running down through the ages of Roman, mediæval, and modern teachers, to the heads of colleges and high-schools in Europe and America, and even to the humbler instructors in the common schools of a country—the body of teachers forms a great hierarchy, in which it is an honor to be enrolled in any grade, from the highest to the lowest. Hopkins was one of the princes in this hierarchy. He was worthy to have stood by Socrates when he drank the hemlock, to have walked with Plato in the Academy, or to have disputed with Aristotle.

Besides the teaching by the living voice and pen, there is another and better, teaching by example. The continuity of the human race, without a break, from generation to generation, gives to example a significance and force far above mere precept. The latter describes the object to the understanding; the former paints it to the eye. The example of Socrates and Washington, for instance, have done more for the encouragement of men than hosts of precepts. To be told how to live is one thing, to be told how one has lived is another and greater lesson. In this respect as in others President Hopkins was a teacher. He taught by example all, and more than all, that he taught by voice and pen.

If we turn now to character, as meaning temper and demeanor, we should say that he was all kindness and at the same time all firmness. In his family and among his intimate friends he was gentleness itself, but never wayward or uncertain. The government of the college in his hands was perfect. The students obeyed him because they loved him, and at the same time had a salutary fear of him. They knew that his motives were the kindest, while his hand was the steadiest.

During his life, Williams College became, as I think—and I hope the thought is not born of the wish—a model institution for the training of American youth in the highest branches of academical study. The larger colleges not less than the universities seem to me to bring together a greater number of students than can well be cared for in a single institution. The supervision of a thousand or a half a thousand pupils by



president and professors must of necessity be less individual than the supervision of two hundred or two hundred and fifty. It must not be forgotten, moreover, that when a greater number than these come together the classes must be divided, which is always a misfortune. The four years of the college course are the formative years of a man's life—years, too, in which the frolics and freaks of youth are more abundant than in later or even in earlier years. So much more is there need of constant supervision over the conduct of the student, while, for the mere purpose of his instruction, the relation of the pupil to his teacher should be the closest. Thus it was with the great teachers of antiquity, and their relations with their pupils serve to explain the marvelous results which followed in developing some of the greatest minds that have taken the lead of the world. My ideal of an American college is that a class should hardly exceed fifty in number, that it should be taught through recitation and by question and answer, and that when this happens, and the professors come to their work with an aptitude for teaching, a love and the proper training for it, the institution is the best for our people. Of the students which Williams College yearly certifies to the world, I can say no less than this, that they indicate by their faces and their bearing a pluck and self-confident energy which I have not seen surpassed anywhere; whether it be owing to the frugal habits which the college inculcates, or to the less opulent regions from which the pupils are chiefly recruited, or to an unseen influence, from the constant presence of these massive hills, imparting something of their hardihood.

I have said that President Hopkins never served in the councils of his country. I mean, of course, the official councils connected with the government of the State. There are, however, other councils in which the citizen may be engaged, with results not less important than if he held a public station. For thirty years, that is from 1857 till his death, President Hopkins presided over the American Board of Commissioners for Foreign Missions. This long service in so honorable a post was due not only to his eminent qualifications but also to the historical connection which this college has had with missions in foreign lands. You all know—for it is one of

those transactions of which we boast—the incident, little in itself, but great in its consequences, which led five students to take shelter under a hay-stack from a summer thunder-storm, during which they offered a prayer, sang a hymn, and made a vow that they would devote their lives to the propagation of the gospel among the unchristian communities of the world; and you know how those young men fulfilled their vow and what came of the fulfillment: how one of them went to the coast of Africa and died on his way home; how another went to Ceylon; and how, out of their efforts, grew the American Board; how another son of Williams went to the Hawaiian Islands and converted that famous group to the true God. Think of the great conquerors who have waded through blood to annex provinces or usurp kingdoms, and compare their deeds with the works of these five men in usefulness and honor! Here we have the Mission Park for their monument; but there are statelier monuments to them in many a far-off land; in the volcanic islands which shelter and surround Honolulu, in the cinnamon-groves of Ceylon, and the jungles and marshes of the Dark Continent. The voyager, as he sails northward from the Capes or from Australasia, hails the peaks of the Hawaiian Islands, seen far off at sea, as the signs of welcome land; but he can see there, also, the everlasting witnesses of the labors of a son of Williams. I have myself been a witness of mission establishments on the banks of the Nile and the plains of India. The last persons I saw in Australia were two missionaries, man and wife, standing on the northeast cape, which looks into the Arafura Sea, waving their farewell to us, as we sailed away among the network of islands that stretches to the southeast cape of Asia. We Americans think that we have much to boast of, and so we have (though we sometimes boast of that we have not); but of that which we have and of which we may justly boast, American missions are not the least achievements of American philanthropy and American energy.

May I, in closing, say a few words of President Hopkins as a personal friend? He was to me as a brother. We started on the voyage of life together, from the same shore, each in his own bark, but keeping always within hailing distance

of each other. I knew, as he knew, that if evil befell either, the other would hasten to the rescue. We have had our good and our evil days, but the good have prevailed over the evil. Now from my bark, still lingering on the sea, I wave my parting salutation to him safely landed on the shore :

“Green be the turf above thee,  
Friend of my better days!  
None knew thee but to love thee,  
Nor named thee but to praise.”



## THE TRUE LAWYER.

President's address before the American Bar Association, delivered at Chicago August 28, 1889.

GENTLEMEN OF THE AMERICAN BAR ASSOCIATION: Thirty years ago it was my fortune, at the opening of the Law School of the University of Chicago, to deliver an address on the "Magnitude and Importance of Legal Science." What was then a city of great expectations has grown, in the lapse of a generation, to be a city of great realities; and the queen of the inland seas already dreams of rivaling in wealth and luxury the queen of the outer ocean. The school whose beginning we then celebrated has flourished beside the city and in its arms. I beg now to salute them both with my sincerest homage.

Your constitution makes it the duty of the president to open each annual meeting with an address, mentioning the most noteworthy changes in statute law on points of general interest, enacted in the several States and by Congress during the preceding year. My first endeavor, therefore, will be to perform this duty. Of the forty-two States and five Territories, all but eight have changed the sessions of their Legislatures from annual to biennial, and of the biennial sessions five have not been held this year. Of sessions annual and biennial there have been forty-two during the year, and from these have proceeded altogether about ten thousand laws, while Congress has enacted five hundred and seventeen more. The task of examining all these has been very great; so great, indeed, that I should have been appalled by it, had not two gentlemen of the bar, Mr. Howard Payson Wilds and Mr. Walter George Smith, kindly come to my assistance. The summary which they have enabled me to furnish will, I think, be found sufficiently minute for the information you desire.

It is worthy of remark that in all this multitude of enactments, there are few, very few, indeed, of general interest. Among the most noticeable of these are those which aim at

ballot reform and the suppression or regulation of corporate trusts. With these and a few other exceptions the enormous mass of enactments, which fill the pages of these statute-books, contains only matters of local interest.

From this general view, it might, perhaps, be inferred that the change from annual to biennial sessions was a wise one. I do not think so. It does not appear to me an encouraging sign for republican government. It is a bad omen when, as now, a general disrespect for Legislatures is fomented. Shall it ever be said that the disuse of representative institutions, which neither the craft of princes nor the strength of armies was able to accomplish in the Old World, the abuse of such institutions has accomplished in the New? Annual parliaments have been the demand of the people under monarchical governments from time immemorial. Is there less reason for frequent meetings of the representatives of the people under these governments which we say "are of the people, by the people, and for the people"? Biennial sessions of the Legislatures will not lessen the evil of too many special privileges granted, but will intensify it. The remedy lies in limiting the scope rather than the frequency of legislation. To allow legislators to deal with all the subjects with which they now deal, but to give them less time for the task, is but to compress within a smaller space the elemental fires which, when too much compressed, will sooner or later explode the whole fabric. We want annual Legislatures to watch and check the other departments of the Government, as well as to make the laws. If it were true that we were able no longer to elect honest representatives, then, indeed, it would be true that we were no longer fit to govern ourselves. But neither supposition is a true one. The upright citizens, they who desire honest government, are an immense majority of the American people; the politicians are a timorous set, who will cower and run the moment they hear the growl of the multitude. It is our own supineness that has begotten the wish for biennial instead of annual sessions of the representatives of the people. The biennial session is, therefore, in my judgment, a movement backward in the march of free government. (*Here followed a summary of the noteworthy*

*changes in statute law on points of general interest made in the several States and by Congress.)*

Having made this analysis of the movements in legislation since our last meeting, I may be permitted, I trust, to make some observations respecting the true place of the lawyer in an American commonwealth, and respecting also his public no less than his private duties. Americans having no personal sovereign, loyalty to the occupant of a throne is unknown to them. The ties which bind them together are the instincts of sympathy and self-preservation. Their sovereign is the collective body of the people, and these speak only through the laws. The judges are recruited from the lawyers; and the three classes, judges, advocates, and attorneys, constitute the machinery by which justice is administered to the citizens. The Legislatures, moreover, are recruited in a proportion large in number and preponderating in influence from the attorneys and advocates. The true place, then, of the lawyer in an American commonwealth is as a minister of justice. Upon him and his brethren, more than upon any other equal number of citizens, depends the good order of the State. As the soldier is first in a warlike nation, so the lawyer is, and must always be, first in a free and peaceful one. Of the committee which framed the Declaration of Independence, all were lawyers, except Franklin. The convention which framed the Federal Constitution consisted chiefly of lawyers. Of our twenty-two Presidents eighteen have been lawyers; a majority of senators have come from that profession; and we all know the strength of the legal element in the House of Representatives. The training and discipline of lawyers in our American system, and their notions of duty and honor, are therefore matters of concern to the whole body-politic. And for the lawyers themselves, whatever may tend to elevate them in their own just estimation and in the just estimation of the public; whatever may enable them the better to understand their true calling and prompt them to fulfill it, should be the study of their lives. It matters little whether we call the profession a public office, or a private office for a public purpose, for we know that its members receive, at the outset, commis-

sions from public authority, and that their duties are threefold—to their clients, to the courts, and to the State. We are accustomed and proud to believe that our profession is one of the great conservative forces of society; that it forms a group around the judges, serving the double purpose of oversight and defense, and that it cherishes the sentiment of honor as religiously as it was ever cherished in the foremost ranks of the profession of arms. In the incessant conflict between law and lawlessness, an immense majority of lawyers have always stood on the side of law.

I do not mean that our profession has been the same at all times and in all places; it has had its periods of partial decadence as of exceptional elevation; its brilliant eras and its eras of routine. There was a time when it was thought unprofessional to solicit retainers. There was a time when it was thought unprofessional to share with the client the fruits of a litigation. There was a time when it was thought unprofessional to consider whether the defense of a client was popular or unpopular. There was a time when the discipline of the bar was supplemented, or rather I should say anticipated by the self-discipline of each member. There was a time when the lawyer was swift to repel the suggestion that his calling had in it an alloy of trade, and was not purely professional. I do not say that the American bar has lost any of its eminent virtue or its eminent dignity, as I am sure it has not lost any of its eminent ability and learning, but I leave you to make a just comparison between the old and the new.

I do not know that I can give a better formula for the expression of the duties of lawyers to their clients and to the courts than in the language of section 511 of the completed "Code of Civil Procedure," prepared years ago for New York. It was copied in most part from the oath prescribed to advocates by the laws of Geneva. This is the language:

"It is the duty of the attorney and counselor:

"*First.* To support the Constitution and laws of the United States and of this State.

"*Second.* To maintain the respect due to the courts of justice and judicial officers.



"*Third.* To counsel or maintain such actions, proceedings, or defenses only as appear to him legal and just, except the defense of a person charged with a public offense.

"*Fourth.* To employ for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and never seek to mislead the judges by any artifice or false statement of fact or law.

"*Fifth.* To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his clients.

"*Sixth.* To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged.

"*Seventh.* Not to encourage either the commencement or the continuance of an action or proceeding from any motive of passion or interest; and

"*Eighth.* Never to reject for any consideration personal to himself the cause of the defenseless or the oppressed."

These several provisions contain, I think, a summary of the duties of lawyers to their clients and to the courts. The judge has a right to the assistance of the lawyer, who for that reason is bound to be frank with him. Not that a lawyer is bound to divulge the secrets of his clients even to the court, but with that exception he is bound to give it all the information asked concerning the conduct of the cause and the course intended to be pursued, and never in anything is he permitted to mislead it.

The question sometimes arises whether a lawyer is bound to give his opinion to every one who asks for it and offers a reasonable fee. I think he is, and especially do I think he is so bound so long as, in the present chaotic state of our laws, the client has no other means of knowing what the law is. The State does not inform him, and he can have no recourse but to the person who has waded through the chaos and dug out the law. If one lawyer may refuse to give his opinion, so may any other, and the client be left in ignorance of his rights and his duties. Therefore, I think a lawyer is bound to deliver his opinion to every comer, with this qualification, however, that if he knows that his opinion will be abused for unlawful or unjust purposes he should withhold it.

In respect of our duties to the State, I insist that we are far behind in the performance of them. I know that I am here treading on delicate ground—not pleasant, I fear, to

many of my professional brethren, but I must speak my mind, nevertheless, especially in speaking from this place, where, being for the occasion placed in front of my brethren, it is my duty to address them in sincere language. We are a boastful people; we make no end of saying what great things we have done and are doing; and yet behind these brilliant shows there stands a spectre of halting justice, such as is to be seen in no other part of Christendom. So far as I am aware, there is no other country calling itself civilized where it is so difficult to convict and punish a criminal, and where it takes so many years to get a final decision between man and man. Truly may we say that Justice passes through the land on leaden sandals. One of our most trustworthy journalists asserts that more murderers are hanged by mobs every year than are executed in the course of law. And yet we have, it is computed, nearly seventy thousand lawyers in the country. It is difficult to make an exact computation, but we know that there are about eleven thousand in the State of New York, which has a population of six millions. Taking the population of the country to be sixty millions and the proportion of lawyers the same as in New York, we should find an army of more than one hundred thousand strong. Reducing the proportion, however, to half that of New York, we should still have fifty-five thousand from the rest of the country, making sixty-six thousand in all. A more accurate estimate may, perhaps, be gathered by referring to the appendix of the report presented to this Association four years ago. Twenty-seven States outside of New York, containing a population of thirty-four millions, are there said to have about thirty-five thousand lawyers. There remain after these States and New York fourteen other States, five Territories, and the District of Columbia, with a population of twenty millions; and these should, in the same proportion as the twenty-seven States, have over twenty thousand lawyers, making a total of sixty-six thousand. Compare this proportion with that of other countries. France, with a population of forty millions, has, according to trustworthy statements furnished me, six thousand lawyers and twenty-four hundred other officials who do the work of attorneys with us; and Germany, with a popula-

tion of forty-five millions, has in the same category seven thousand. Thus the proportion of lawyers is, in France, one to 4,762; in Germany, one to 6,423; in the United States, one to 909.

Now turn from the performers to the performance. The report just mentioned contains, in text and appendix, a statement of the length of time required in the courts of the country for the final decision of a lawsuit, and a melancholy record it is. "It appears," says the report, "that the average length of a lawsuit varies very much in the different States, the greatest being about six years and the least one year and a half." I might add that very few States finish a litigation in this shorter period. Taking all these figures together, is it any wonder that a cynic should say that we American lawyers talk more and speed less than any other equal number of men known to history?

The talking and the writing that we suffer are wonderful to hear and to behold. Our formal documents, deeds, bonds, mortgages, insurance policies, bills of lading, charter-parties, and numberless other contracts, in the older States and sometimes in the new, are marvels of iteration and expansion, centuries old, musty and rusty. We cling to them all the same. If life were thrice or twice the allotted term of threescore years and ten, we might, perhaps, keep on reading and writing the old phrases, and might listen complacently to the long harangues which salute us whenever we enter the courts, reminding us of Hamlet's bitter reply, "Words, words, words!" and we might possibly read with patience the dissertations that fill the-law-books; but life is too short and patience too weak. I know no parallel to the cataracts of words resounding in our ears, save in the diverting play of "Bombastes Furioso," from which pardon me if I take this pregnant extract:

"A blow—shall Bombardinian take a blow?  
Blush, blush, thou sun; start back, thou rapid ocean!  
Hills, vales, seas, mountains, all commixing crumble,  
And into chaos pulverize the world!  
For Bombardinian has received a blow,  
And Chrononhotonthologos shall die! . . .

Ha! what have I done?  
Go call a coach, and let a coach be called;  
Let him that calleth be the caller,  
And in his calling, let him nothing call  
But coach! coach! coach! oh, for a coach, ye gods!"

Need I add that you and I have read legal documents and heard forensic harangues which, in point of iteration, or inconsequence, or grandiloquence, might vie with this precious morsel?

The delays in the administration of justice are scandalous. We have quite forgotten the ancient maxim, "*Bis dat qui cito dat*," although it is as applicable to the awards of justice as to the gifts of beneficence. There is no reason in the nature of things why any lawsuit, if the witnesses are within the jurisdiction, should not be determined within a year from its beginning. When a litigation has run through the four seasons, it has run long enough. Twelve months are as long as an American citizen should be obliged to wait for justice, and I think it should be deemed a fundamental precept to all lawgivers and ministers of the law, that the judicial force be so arranged and the methods of procedure so contrived that the end of the year from the beginning of the process shall see the end of it.

I have said thus much of what I call the private duties of the lawyer—that is to say, his duties to his clients and to the courts—that I might not appear to have omitted anything so important and so fundamental; and I have spoken of so much of his public duties—that is to say, his duties to the State—as relate to the administration of justice. I wish now to mention his duty to help remove patent defects, and from time to time improve the law, and his further duty to help diffuse among the people a knowledge of all the law of the land.

That great defects exist, lawyers know and other men feel. How could it be otherwise? The bulk of our jurisprudence came from our forefathers, it is true, but from forefathers of a different age, different geographical position, and different political and social institutions. That the changes which these differences require have not been marked out by the lawgiver, is one of the anomalies in history, to be explained only by the



exacting labors of a recent people, and the immobility, or what philosophers call the *vis inertiae*, of the legal profession. An English journal not long ago described our legal condition in this uncomplimentary language: "The British king and the British Parliament still lay down through the law which proceeded from one or the other of them, rules of life for Americans which they dare not disobey. The old idea that the law is the perfection of human reason, has very much died out in the country which once believed in that audacious maxim; but it is still acted upon by Americans as if it were true, and the lives of three fourths of the nation are affected by it at every turn." This is a true indictment, and I wish those of our people who are fond of quoting English opinions and aping English manners would lay it to heart.

Of course, so long as the law remains in the chaotic state which I have described, it is impossible to condense and arrange it in the manner required by the needs of the citizen. What is required and what must at some time or other be undertaken is a treble process—the process of elimination, the process of condensation, and the process of classification. This performance would make a code, call it by whatever other name you please. You might make its provisions more or less general, it would be a code all the same, and would give to the citizen a view of the law as a whole, enabling him the better to understand, not only his rights, but the further legislation needed to protect them. That such a work is the inevitable outcome of American institutions, I am confident, and I beg leave to commend it to your earnest attention. Many lawyers are frightened by the idea of a code, or, rather, I should have said, by their idea of one. They imagine it to be revolutionary, something that would take away the substance of what they are accustomed to, and force them to learn a new system. These persons greatly err. It surely is not revolutionary to set in writing what has already been decided, and of course has been spoken or written by somebody somewhere. It is not revolutionary to condense the utterances that have been made from the bench in hundreds of years. It is not revolutionary to arrange the several propositions thus evolved. No spectre is here to frighten anybody.

The arguments for and against a code have been so fully discussed that he who runs may read; though I fear that many of my professional brethren do not much concern themselves with such discussions. I shall not here enlarge upon what I conceive to be the advantages of codification to the lawyer and the judge; I will regard it only in its relations to the great body of citizens; and I insist that it is the first duty of a government to bring the laws to the knowledge of the people. That the laws of the land should be known to all who are to obey them, and known beforehand, should seem to be political axioms and self-evident. Need I add that these axioms are in practice disregarded and, I might say, almost universally disregarded? Of the forty-two States of this Union, there are but five—California, North and South Dakota, Georgia, and Louisiana—which have attempted to give to their citizens the whole body of their laws. Indeed, it is avowed by a great many, perhaps a majority of the lawyers of the country, that such an attempt should not be made; that it is better for the judges to make the law as they go along and to make it after the transactions to which it is to be applied. Such may not be in all cases the language of these arguers, but such is the real purport of their argument. To state the argument is to refute it. Do not answer by saying that this is an unfair statement of the fact, and that, in reality, the judge does not make a new law, but discovers an old one and applies it to the case. Then, I ask, why was not this old law written out and given to the contestants beforehand that they might know how to act? You reply, that the old law was, in fact, hidden away, and dug out by the diligence of the judge and the counsel after the occasion arose for applying it. Then, I rejoin, why not begin with the process of digging out and bringing to light? The adversaries of codification stand in this dilemma. They must insist either that there are no old laws as yet unwritten, or that all are written somewhere. Now, if they are written anywhere, they exist for the whole body of citizens, not alone for the lawyers, and therefore should be put into a form where the citizens can find and understand them. This can be accomplished by no other means than by collecting, condensing, and arranging them.

That duty, I insist that we—you and I—are bound to fulfill.

We take, in my opinion, but a very narrow view of the obligations of our profession, when we leave out of it that of improving the laws we help to administer. One who is content with applying these as he finds them, solacing himself with the idea that it is no part of his business to help make them, or to make them better, has an imperfect estimate of his calling. His obligations are, in fact, commensurate with his opportunities, and these are greater than those of any other class of citizens. He sees more clearly what is needed, and he knows better how to supply it.

A great many members of our profession have a superstitious reverence for the law of precedents, or what they call the common law of England. Let me remind them that a late Chief-Justice of England pronounced the present condition of the law of his country to be simply chaos; and that Lord Campbell, in his "Lives of the Chief-Justices," writing of Lord Mansfield, uses this language: "He formed a very low, and, I am afraid, a very just estimate of the law of England which he was to administer. . . . His plans seem to have been to avail himself, as often as opportunity admitted, of his ample stores of knowledge acquired from his study of the Roman civil law and the juridical writers produced in modern times by France, Germany, Holland, and Italy."

The common law of England, at the time of our Revolution, was divisible into two portions, one public and the other private. The public portion, with its three great branches, trial by jury, *habeas corpus*, and representative assemblies, was worthy of all commendation. Its private portion, that which related to land and private obligations, was but little advanced beyond the region of semi-barbarism; most of the good which it had, and of that which it has since accumulated, was the contribution of the Romans, that magnificent people which once ruled the world by the sword, and have since held a half dominion by the silent empire of their laws. When the apostle to the gentiles was accused by his countrymen, he appealed not to the laws of his nation, but to the laws of Rome. "It is not the manner of the Romans," answered the

Roman governor to his accusers, "to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself, concerning the crime laid against him." During the century that has elapsed since our Revolution, the laws of England, and of America following in the footsteps of England, have gradually gathered to themselves fragments of many other laws, and have elaborated many that are new, until at last we see spread before us the vast conglomerate of to-day. Let us collect and bind together in their appropriate places what we have, and then we can the better tell what more we need.

My closing utterances from this place to the members of this Association, and to all the members of my profession as well—a profession to which I have devoted a long life, and which I greatly honor—shall be in these few words: You must, of course, be true to your clients and to the courts, but you should also give speedy justice to your fellow-citizens, more speedy than you have yet given, and you should give them a chance to know their laws.



## CODIFICATION ONCE MORE.

Answer to Mr. JAMES C. CARTER, reprinted from the "Albany Law Journal" of December, 1889, with slight changes.

THE address of Mr. James C. Carter, delivered last July at the annual meeting of the State Bar Association of Virginia, on "The Provinces of the Written and the Unwritten Law," did not fall into my hands until a few days ago. I find on examination that it is little more than a repetition, reduced and recast with variations, of his former paper, the mistakes of which Mr. Robert Ludlow Fowler pointed out soon after it was written. The present paper might have been entitled "A New Assault upon Codification." Code has been Mr. Carter's *bête noir* time out of mind. His hatred of it appears to have increased with age, but while the vigor of the assault has not increased, the present essay makes concessions fatal to his argument.

That I may do no injustice to the paper I am commenting upon, I quote from the prefatory note the following, which I may take to be the essence of the doctrine put forth to the assembled lawyers of Virginia :

"The new aspect now given to the argument is to lay down as its foundation the proposition that human transactions, especially private transactions, can be governed only by the principles of justice; that these have an absolute existence, and can not be *made* by human enactment; that they are wrapped up with the transactions which they regulate, and are *discovered* by subjecting those transactions to examination; that the law is consequently a science depending upon the observation of *facts*, and not a *contrivance* to be established by legislation, that being a method directly antagonistic to science.

"I do not mean that legislation is itself free from the operation of scientific principles. There is, indeed, a science of legislation; but, though allied to the science of jurisprudence, it does not include it, and is quite different from it. It is the science of *making* absolute political regulations, not of *discovering* the rules of justice. Legislation is, in one aspect, the *opposite* of jurisprudence, according to the more precise import of the latter term."

And I also quote from the sixty-two pages of the address itself the following passages, which are sufficient for my present purpose. The italics are his. The passages I will divide according to their subjects:

First. His definition of law and the distinction between the public and private portions. On page 11 he says the law is "that body of rules which springs from and rests upon *the social standard or ideal of justice*." Two pages later he says that it is "that body of rules, for the regulation of human conduct, which is enforced by the State."

Page 7.—"What is this thing which we call '*the law*,' and about which we debate whether it should be written or left unwritten? Is it something which exists only when men *create* it, and as men create it, or has it existed from all eternity, and from time to time revealed itself to satisfy the aspirations, or the needs of the human race? or is it in part the one, in part the other?"

Page 15.—Public law "relates immediately to the organization of individuals into that great public corporation known as the state, and provides for the management of its concerns. And, on the other hand, that other body of law which is not found in the statute-book, may from its general character and purposes be designated as *private law*. We find it, therefore, to be substantially true that, according to the *actual* division of the provinces of written and unwritten law as they have arranged themselves in the natural growth and progress of society, public law alone is in writing, and is always in writing, and private law is left unwritten."

Page 55.—"I need not speak of the criminal law; for, although it prescribes rules of conduct, it yet prescribes them for public purposes, and the penalties are entirely arbitrary, and many offenses—those which are mere *mala prohibita*, as distinguished from *mala in se*—are of the same character. This whole department belongs to the province of public law."

He had previously said (page 14) that laws "for the establishment of courts and the regulation of their modes of procedure" were part of the public law.

Page 55.—"Nor need I speak of the procedure of courts;

for, although it is largely employed in enforcing private law, it is yet one of those instrumentalities which must be supplied by the Legislature. The subject is, therefore, one properly belonging to public law."

Page 13.—"I should now turn your attention to the form in which we find these rules, or perhaps I might better say the method by which we ascertain them. I need go no further at this point before an audience of lawyers than to say that they are either reduced to writing or left unwritten; and, that, in the former case, they are ascertained by consulting the statute-book (although this simple act is not always of itself sufficient for the purpose), and in the latter by a resort to reported decisions, to authoritative text-writers, and by the employment of the rules of right reason."

Here, then, we have his definition of public law. He considers it to be that portion of our law which, according to New York notions, makes up the Political Code, that which makes up the Penal Code, and that which makes up the two Codes of Procedure, Civil and Criminal.

Having given these several definitions, let me make some extracts to show how Mr. Carter would treat these different departments of the law:

Page 11.—"In respect to the unwritten law the social standard of justice is ascertained and declared by the judges, who are the experts selected by the people for the purpose."

Page 16.—He does "not believe that an independent and homogeneous people can be found who, so long as they preserve those qualities, did not have their whole public law in writing and leave their whole private law substantially unwritten."

And again (page 28), "*the fact must always come before the law,*" and "it is impossible to write down the law applicable to any future transaction, because it is impossible to know the law applicable to any future transaction."

Page 37.—"It can scarcely be too often repeated that the office of private law consists in applying the social standard of justice to *known* facts, and that in respect to future transactions there is in human apprehension no such thing as *law*, except the broad injunction that *justice must be done*. On

the morning of creation the obligation of this precept was felt by the first man."

Page 15.—"Nearly the whole of that body of law which really prescribes rules of civil conduct, which is stamped with the moral quality of justice, and which governs the private transactions of men with each other, is substantially untouched by the statute-book."

How much of this is stamped with the moral qualities of justice is, however, not explained.

Page 17.—"The real and only question is, whether the *private* law now unwritten should be reduced to writing."

But he does not explain whether the qualification "now unwritten" refers to England or to France, to Virginia or to California.

Once more (page 59): "These considerations indicate the lines upon which all reformation and improvement of the law should be attempted. I know of but three requisites necessary to the prosecution of the work: First, that legislation should be restricted to its just province, that of *public law*, and should not attempt to deal with those scientific problems of *private* law which are beyond its power to solve."

Taking the sentences which I have quoted and translating them into plain language, do they not mean that private law is the will of God implanted in the hearts of men, not expressed in human speech, and indeed unspeakable until a fact occurs which requires its application, and then it is expressed by experts, the judges, who are the best interpreters of the Heavenly Will? We all believe that the will of God is justice, but that this will should not be expressed until some one has violated it, few of us believe, and few will ever believe it, so long as the world endures.

Before I go any further, let me observe that, for us lawyers of New York, the argument of Mr. Carter proves too much. He condemns our Revised Statutes, our Penal Code, our Code of Criminal Procedure, and our Code of Civil Procedure. In respect of this last I agree with him, not because in its theory and in its original execution it was not a wise and successful measure, but because it has been overloaded and confused by a revision, which Mr. Carter's associates in this war against



codification, if not Mr. Carter himself, forced upon the friends of the original Code. With all its faults, however, it is better than the old common-law practice, with its barbarisms. The principles of this Code, to say nothing of its details, can never be abrogated from the laws of New York; while it is safe to say that the Revised Statutes, the Penal Code, and the Code of Criminal Procedure are firmly established in the legislation of the State. Of our eleven thousand lawyers, I do not believe that there are one hundred who would repeal them. Therefore, Mr. Editor, if I were addressing only your readers within the State of New York, I might here take leave of Mr. Carter's address, relying upon the familiar rule of logic that, when an argument proves too much, it proves nothing.

Laying aside, however, the experience of New York with her Revised Statutes and her three existing Codes, let us look at Mr. Carter's argument by itself. Can any one tell what part of the law Mr. Carter would wish to be reduced to writing and what left unwritten? If he were asked, he would probably answer, All public law must be written and all private law unwritten, and so it has ever been. When and where has the public law of England been written? Part only of the Constitution of that country has been put into statutes. It is emphatically a constitution of precedents. When and where among Anglo-Saxon nations has the procedure of courts been fully written in the statute-book? Never anywhere until the Code of New York came into being, since when it has indeed been written in a majority of the States of this Union, in England and in Ireland, and in English colonies all over the world.

The *argumentum ad hominem* is often a proper one, and never more proper than here. It was only last winter that Mr. Carter ardently contended before a committee of the Legislature that the law of evidence should not be codified. He had, if I am correctly informed, strenuously opposed those Codes of New York which, according to his own admission now made, are within the domain of public law, and his opposition was, if I mistake not, made because they were Codes rather than because he thought them bad Codes.

Let us turn now to private law. He admits (page 15) that "in addition to the rules which define and punish crimes, those which regulate the transmission of the title to property are laid down with some detail, and some few provisions are found relating to the rules of civil conduct, and which, therefore, belong to the law properly so called."

Passing, however, from the personal argument to considerations of convenience if not of necessity, let me ask why the private law, relating to the social relations, should be left unwritten. Should the period at which a child becomes of age be left to the judges or to the Legislature; should the laws of marriage and divorce be made by the courts or by the lawgivers? Was it better that the law of uses, trusts, and powers relating to real property should be left to the involutions of the common law, or be reformed and expressed in the Revised Statutes; should the formalities of testamentary disposition be prescribed by the Legislature or by the courts?

Take the subjects embraced in the proposed Civil Code of New York, and consider whether they had better be intrusted to the judges or to the legislators of the State? Leaving out personal rights and relations, already mentioned, what shall be said of the rules of property, the things in which it may exist, the different interests in it, the conditions of ownership, restraints upon alienation, accumulations, estates in real property, servitudes, riparian rights, things in action and their assignability, of the different rights acquired by occupancy, accession, transfer, testament, or succession, of obligations, whether joint or several, conditional or alternative, whether to be written or verbal, how renewed or extinguished, of the different kinds of contracts, their conditions, interpretation, and performance; what are lawful and what unlawful; and then of the particular contracts of sale, exchange, deposit, lien, hiring, service, carriage, trusts, agency, partnership, insurance, indemnity, guaranty, and negotiable instruments? Can not the general rules of law, relating to these subjects, so far as they are already settled and established as rules of decision, be stated in writing? We know that they can. Why, then, should they be left unwritten? Mr. Carter's theory is that the law on these various subjects dwells in the consciences of men, is by its

very nature unwritten, has been always unwritten, and must remain unwritten to the end of time. He would even give a religious aspect to his theory. But is it not next to blasphemy to pretend that the will of God is never revealed to his erring children until they have sinned? I supposed that, according to the apostle of the Gentiles, sin came in with the law. "Where no law is, there is no transgression." Not so, Mr. Carter. Let me ask, in as much seriousness as I can command, was the rule of *caveat emptor* of divine or human origin? Was the rule in Shelly's case a revelation from the sky, or was it evoked from the metaphysics of legal schoolmen? The courts are now wrestling with Mr. Tilden's will, which Mr. Carter drew. Two judges, the "experts selected by the people for the purpose," have pronounced it good; two others of these experts have pronounced it good for nothing. Which were right? But what a divinity that must be which inspires equal groups of its priestly experts with exactly opposite oracles!

Mr. Carter's history is as faulty as his theory. There is not now existing in the world a single people, civilized or half civilized, which has not now, and for long has had, multitudinous enactments of private law. Begin with the laws of Moses, the first and greatest of lawgivers; read the code promulgated by him and see it filled with private law. Go back even to the ten commandments; how many of them were of public and how many of private law? We all know the history of Roman law and Roman codification. One of the first books put into Mr. Carter's hands when he entered a law-school was probably Kent's "Commentaries," where he might have read the following: "The Partidas is the principal Code of the Spanish law, compiled in Spain under Alfonso the Wise, in the middle of the thirteenth century, and it is declared by the translators to excel every other body of law in simplicity of style and clearness of expression. It is essentially an abridgment of the civil law, and it appears to be a Code of legal principles, which is at once plain, simple, concise, just, and unostentatious to an eminent degree." There is not now a people from Cape Colonna to Archangel, or from the Shetland Isles to Gibraltar, that has not a part, at



least, of its private law written in its statute-books, whether made by Councils, Parliaments, Congresses, or other legislative assemblies. Even the Ottoman Empire, then Greece, then Italy, France, Spain, Russia, Sweden, countries that are playing a not inconsiderable part on the theatre of the world, have their respective Codes, abounding in private law. Germany is at this hour engaged in framing a Civil Code for the whole empire, and England has passed an act of Parliament to "codify the law of bills of exchange," etc.

What shall be said of the old sea laws; the laws of Wisby and Oleron, and the Consolato del Mare? I have now lying on my table a list of the written laws of India and China, and of Iceland, Norway, Sweden, Gothland, Denmark, of the different Anglo-Saxon communities, of Prussia, Saxony, Austria, and other Germanic states, of Holland, Switzerland, Italy, and France—sixty-four bodies of law in all, abounding, I might almost say filled, with what Mr. Carter calls private law. And we all know that of the Spanish-American states on these two continents all or nearly all have elaborate Codes of their private as well as their public law.

Finally, Mr. Carter's definitions are as strange as his theory and his history. I have already given his definition of law, and, to show the contrast between it and that of the *Corpus Juris*, I give the two side by side:

Mr. Carter's definition of law: "What we call *the law* is, in any political society, that body of rules which springs from and rests upon *the social standard or ideal of justice*." Again, "I have defined the law as being that body of rules for the regulation of human conduct which is enforced by the state."

Now the Roman law: "*Lex est quod populus Romanus senatoris magistratu interrogante, veluti consule, constituebat.*" § 4 I, 1, 2.

Mr. Carter's definition of private law: "It is scarcely an exaggeration to say that nearly the whole of that body of law which really prescribes rules of civil conduct, which is stamped with the moral quality of justice, and which governs the private transactions of men with each other, is substantially untouched by the statute-book."



Now the Roman law : "Constant autem jus nostrum aut ex scripto aut ex non scripto.

"Scriptum jus est lex, plebiscita, senatus consulta, principum placita, magistratuum edicta, responsa prudentum." §§ 3 and 4, I, 1, 2.

"Ex non scripto jus venit, quod usus comprobavit. Nam diuturni mores consensu utentium comprobati legem imitantur." § 9, I, 1, 2.

"Publicum jus est quod ad statum rei Romanæ spectat, privatum quod ad singulorum utilitatem ; sunt enim quædam publice utilia, quædam privatim." I. 1, § 2, D. 1, 1.

Mr. Carter's notion of private law, after all, appears to be that portion of the law of the land which does not relate to the mechanism of the state, or to crimes, or to the procedure of courts, or to the transmission of the title to property and the few provisions relating "to the rules of civil conduct." We see now how he narrows the field of inquiry into the expediency of codification. He does not question, he must be held to admit, the need of a Political Code, a Penal Code, a Code of Civil Procedure, a Code of Criminal Procedure, and so much of a Civil Code as relates to the transmission of the title to property. What remains? Personal relations and contracts, or, as some use the more comprehensive word, obligations. The only practical question, then, which he raises is whether the rules of law relating to these subjects should be codified, or, if one prefers the expression, written in the statute-book. He does not object, it should seem, to codification, if it be of his kind, which is as he explains it (page 53) : "There is also an instance in which it may be expedient and to some extent necessary, to put some special parts of private law in the form of written enactments. In general it is the prime object of private law to do *justice* between man and man, and to do it in each particular case. But yet, while this is and should be the constant aim, *stability and uniformity* are important considerations ; and, in order to secure these, general rules are necessary, which sometimes involve a slight sacrifice of absolute justice in particular cases." And again (page 56) : "I am well aware that our statutory law altered, amended, and enlarged, as it from time to time is, sometimes

with diligence and caution, at others with haste and neglect, becomes confused and embarrassed with uncertainties, omissions, and redundancies, which make the study and application of it difficult. It consequently demands from time to time a thorough revision, and it may be occasionally wise to have the confused mass rearranged, reduced to a harmonious and orderly system, and re-enacted as a unit." Now, why, in reason, should not the same process be followed with the uncertainties, omissions, and redundancies contained in our tens of thousands of the utterances of judges making law?

It is too late to debate the question of codifying the common law, in the face of such a host of advocates as that now enlisted for it. The battle was fought and won more than fifty years ago when Savigny attacked codification, and he and his followers were overcome. Gibbon wrote, even in the last century, that "the discretion of the judge is the first engine of tyranny; and the law of a free people should *foresee* and *determine* every question that may possibly arise in the exercise of power and the transactions of industry." So long ago as 1836 Judge Story, with his associates Metcalf, Greenleaf, Cushing, and Forbes, made a report to the Legislature of Massachusetts favoring general codification, and stated, among other things, that "it is not too much to affirm *that the whole law of insurance*, as far as it has been ascertained and established by judicial decisions and otherwise, may now be stated in a text not exceeding thirty pages of the ordinary size of octavos." Walworth, the last Chancellor of New York, declared himself in favor of general codification.

Mr. Carter, unconsciously no doubt, when writing that "the fact must always come before the law," fell into agreement with Bentham's homely apologue: "It is the judges . . . that make the common law. Do you know how they make it? Just as a man makes law for his dog. When your dog does anything you want to break him of, you wait until he does it, and then beat him for it. And this is the way the judges make the law for you and me."

An International Maritime Congress is now in session at Washington. What is it for? To make rules of navigation. For what kind of shipping? Public and private; for the iron-

clad and the fishing-smack ; for the whaler struggling in arctic ice and the yacht gliding over summer seas. The Belgian Government of the Congo state, not waiting for the facts to precede the law, has just promulgated a Civil Code for that state.

What makes judges and lawyers "experts" in discovering the law of conscience, or, in other words, the divine will implanted in the hearts of men? Do they know what is divine and what human better than other men, save as they have been instructed in laws already written? Indeed, if the law resides in human hearts, why is there need of lawyers at all? Other men have as tender consciences and as deep knowledge of ethics, as they who have studied in the law-schools or in lawyers' offices. Has not every human being, from Mr. Carter's "first man" down to the latest descendant, that divine afflatus which reflects the will of the Almighty? And if "discoverers," as Mr. Carter calls them, of this law of conscience were needed, why are not clergymen, they who have made the sacred volume the study of their lives, the best of all interpreters?

Mr. Carter is unfortunate and not quite ingenuous in his quotations from Pomeroy and Amos. He knows very well the explanation given by me on several occasions of their criticisms upon the Civil Code proposed for New York, but he omits all reference to this explanation, and further omits to state that both these gentlemen were—when they wrote—most pronounced advocates of the codification of private law, and continued to be so to the end of their lives.

I do not think that I need take more of your space with Mr. Carter's address. If it were needful, I could go over it page by page and point out fallacies on nearly every one. But the specimens I have given are enough. "Ex uno disce omnes."\*

\* There is a homely saying, that "soft words butter no parsnips." So fine rhetoric makes coarse law. Hooker, in a burst of eloquence, exclaimed that law is "the harmony of the world"; and Sir William Jones that "sovereign law, the world's collected will, o'er thrones and globes elate, sits empress, crowning good, repressing ill"; but if Mr. Carter were to rely on those passages as authorities in one of his suits about the Croton Aqueduct frauds, he would probably lose his case. England and Scotland lie side by side on the same island, but they have different systems of law. How did this happen? Is not the divine will or the human conscience the same on both sides of the Tweed?

Let me now, Mr. Editor, since I am upon the subject of codification, add a few words about the Civil Code and the Code of Evidence still pending in our Legislature. Is it not time that they were enacted? Do they not embrace subjects of great importance to the people; of more importance, indeed, than any other subject likely to engage the attention of the Legislature? If so, the only question that remains is, whether these Codes or either of them will give to the people a better knowledge of their laws than they now have. The bills have passed the Legislature, the Civil Code time and time again, the Code of Evidence once. If they contain statements of the law that ought to be declared, the Legislature should enact them; if they do not contain such statements, amend and substitute until they do. They who prepared these Codes were among the "experts" of which so much has been said in Mr. Carter's address. They have subjected them to every test within their reach; they have asked for the advice and assistance of lawyers throughout the State; they have indeed asked for a special commission to re-examine them. Is it too much now to say that, if these Codes are not accepted, there will be none enacted within this generation?



## SOME REPREHENSIBLE PRACTICES OF AMERICAN GOVERNMENT.

Address before the Reform Club of New York, January 10, 1890.

IN an article published in the "North American Review" for June, 1888, I endeavored to point out the true theory of American Government. It was then my design to follow the article with another, on the practice of that government, believing that, if the theory and the practice parted company, one or the other must in the end give way and disappear. Other occupations prevented the fulfillment of my design, until in the March following I found myself on the Nile for a winter's rest in a softer climate than my own. There I had all the leisure I needed, and I thought it a good place to begin such a work as I was to engage in, but I soon found myself drawn away by the fascination of the scenes around me, and I laid the task aside until my return to my own country. Meanwhile I had much to think of, not only in the scenes but in the stories of the great river. Of all places in the world this is the one where best to study the rise and fall of nations; here where, according to the most authentic annals, there was an established government six thousand years ago. Why is it, I asked myself, that Egypt, first-born of states, the land whose harvests were scattered over half the world, the primeval home of learning and art—why is it that she has so fallen behind as to become at last one of the feeblest and least happy of them all? It is not because the men who lived there so long ago were weaker than the men of to-day. They who raised the obelisks of Luxor and the temple of Karnak, who planted the colossi on the plain of Thebes, who built the pyramids before Abraham visited the land of Ham, and who set the Sphinx at their feet as if to turn the faces of mankind forever to the East—those men were not inferior in grandeur of conception or in vigor of execution to the men of other races or of later ages.

The handbooks count more than forty dynasties that have borne rule in this valley. Each in its time may have expected its own dynasty to last as long as the world. All, nevertheless, have disappeared, until at last the country is governed by a vassal of the Sultan of Constantinople, who himself rules in the name of a prophet born five thousand years after the first sovereign of the Nile. All countries, it is true, are not like Egypt; but what country has escaped change and revolution? The nations which overthrew her have been in their turn overthrown, and have gone down one after another into the abyss which engulfed in its remorseless billows dynasties and commonwealths alike. Are we to be exempt from the calamities that have befallen so many nations? What was the subtle poison that infused into her mighty limbs the atrophy which brought her to the dust? Is there no poison lurking in the veins of modern states? And, above all, is there none lurking in our own? This question has confronted us at all times of our history, and never more than now. Older governments may perhaps rest more assured, because their institutions have been hardened by time and use; but American Government, whatever we may say or think, is yet to some extent experimental.

The study, then, of our American institutions, in their practical aspect, is one of the greatest, if not the greatest, of all the studies to engage the mind of an American citizen who loves his country. And what American does not love her? Wherever within her borders he may chance to have been born, whether in rugged new England or imperial New York, or in the great central valley that lies between the Alleghanies and the Rocky Mountains, or in the golden Occident beyond; whether in his boyhood he trod the hillside or the prairie, his heart glows whenever he sees her flag unfurled or hears her name spoken. And if he has traveled into other lands, he has there learned more than before what it is to love his home.

There are, we know, causes other than government which affect the character and happiness of a people, such as geographical position, physical features, extent of territory, climate, soil, and, more than all, race. The organism which

we call the State performs a double function, one forbidding and the other commanding, one to protect the citizen against the State, the other to make the State protect the citizen. In all social compacts, whether expressed or implied, whether perpetual and hereditary, or from time to time renewable, there are limitations as well as grants of powers. The most barbaric of autocracies is bound by some restraints, the wildest of democracies by some also, and constitutional governments teem with both. Our constitutions are memorable examples of social compacts, the Federal Constitution abounding in exclusions, explicit and comprehensive, and the State constitutions containing, it may be, few in the beginning, but more and more as the need of restraint became more and more manifest.

These several causes, as I have described them, have, by their conjoint operation, wrought for the American people a degree of prosperity and happiness such as was never before seen, on so large a scale, in the history of the world. There is less and less acrimony in our political contentions. And especially within the last hundred years there has been brought about an improvement in the physical well-being of our people, marvelous, even to ourselves. Men, women, and children are better fed, better clothed, better housed, and better educated than they were in the last century, and we have heaped up riches beyond all parallel, until at last we have made it a cause of boasting that we have become the richest nation of the earth. Yet, after all, what does this boast of riches signify? Had the wealth of a dozen of our millionaires sufficed to purchase the whole of Athens, from wall to wall, in the palmy days of Pericles, a million of such millionaires could not have produced the Prometheus of Æschylus or the Phædo of Plato, or the Oration for the Crown. The greatness of a people consists not in the riches they have amassed, nor in their wide domain, nor in the plenitude of their charities or the magnitude of their power, nor in the luxurious homes they have builded, but in the men and women they have reared, in the gentleness of their manners, in the wealth of their literature, in the wisdom and enforcement of their laws, in the purity of their morals, their



sense of beauty, their culture of art, their hatred of wrong, their love of right, their deference to women, their courage, their energy, and their self-control withal. Let us measure ourselves by these standards, and according to such measurement let us boast, if boast we must.

These reflections lead us naturally to a closer examination of the practices of our own government, the Federal Government of the American people, using the word American in its restricted sense, as applicable only to our great Northern confederacy. Let us look at our institutions as working institutions—not the ideal, but the real; not as they may be in theory, but as they are in practice, as we see them in operation about us. Then, when all is said and done, let us ask ourselves whether our practice has not latterly departed, and in some respects widely departed, from the theory of the government and the practice of the fathers; whether we have not fallen, by accident perhaps, or by insensible gradations, into the practice of dealing with the national and State governments as if they were great corporations for private as well as public profit. Has not the result been the perversion of the executive power in the making of appointments to office, and the perversion of the legislative power in the grant of privileges; in other words, the spoils system in the executive department and the privilege system in the legislative.

I do not speak of past mistakes, which can not be recalled. We have made some memorable ones in our hundred years of history, and the effects are still visible; but, since they are irrevocable, it were a waste of time to discuss them here. Nor am I speaking of mere foibles, of which we, no less than the rest of the world, have our share, nor yet of those minor offenses against good sense and good taste, with which, rightly or wrongly, we are charged, but which are not so serious as to endanger our well-being.

He is a wise man, and it is a wise nation, that stands ready to profit by the reproofs of friends no less than the reproaches of enemies; for in passing judgment upon ourselves we are apt to be misled by self-love, and we are not so self-contained or self-assured as to defy or even to be indif-



ferent to the general judgment of the Christian nations of the world.

Now, there is no mistaking the opinion of Christendom. The statesmen, writers, and thinkers of Europe—even those who are friendly—have formed an opinion, right or wrong, which, if it were put into words, would be something in this wise: We know that you have done great things; the way in which you have marched through the forest and over the prairie to build cities and commonwealths; your untiring industry; your self-restraint and self-reliance; your patience in defeat, your moderation in victory; the harvests you are pouring into the lap of the world—all these have won our admiration. As we go back to the beginning of your history we remember how your forefathers turned their backs upon tyranny in the Old World and encountered dangers and hardships innumerable in the New; how, under the lead of statesmen and heroes, they founded a new empire in the West; how they threw down the gauntlet to imperial England, and beat her back beyond the sea. We remember, we admire, we praise all these things; but we have to remind you, nevertheless, of faults that you ought never to have committed, faults for which there is not only no reason, but no excuse. We charge you with giving offices and privileges to partisans, as rewards for votes; we charge you with the electoral and official corruption which naturally flow from such untoward gifts. There are some among us who rejoice; there are others, larger in number and more hopeful in spirit, who are grieved to find that a scheme of government so grand and benevolent in its conception, and so generally beneficent in its operation, should show signs of weakness in some quarters and of sinister influences in others, disheartening to the lovers of liberty and order in the Old World who have looked to you for a new and untarnished example.

If we ask for the evidence on which these charges are founded, they refer us to our own journals. My first task, then, will be to examine these journals in order to see how far they support the charges, making due allowance for the extravagance of expression to which we are too much accus-

tomed—for exaggeration is, I fear, fast becoming the prevailing habit of American thought and life.

We have lately passed through a presidential election. Members of the lower House of Congress were elected at the same time, and so were many of the Governors of States and members of the State Legislatures. The candidates for the presidency were nominated in June, and the election took place in November. The intervening period was full of struggle and uncertainty. As the election drew near, the excitement was increased; meetings were held throughout the country, in cities large and small, and in the country towns. Processions by daylight and by torchlight were organized, some of them so huge in their proportions as to have swollen, it is said, to twenty thousand and even fifty thousand men. When the election was over, and the suspense was broken, the relief was like that of a calm after a hurricane at sea, and men began to calculate the losses which the suspense had caused them. Within six days after the election one of our journals startled its readers with this heading in capitals across its broad sheet: "Lost, five hundred million dollars! This is what a presidential election costs the country every four years, our principal merchants declare." One gentleman, a great authority in railways and business generally, declared that "the cost to the country of the presidential election is almost incalculable. . . . There are frequent suspensions of various industries, and a general check upon expansion and enterprise. Mill-owners and merchants keep close within necessary demands, waiting for the policy which the result may determine. New enterprises halt, and partially completed ones go slow." The loss so estimated, it must be observed, was independent of the disbursements made during the canvass for purposes good or bad. These will be mentioned hereafter. The passages refer only to the loss consequent upon apprehension regarding the event. This apprehension may have been unreasonable, and these figures may have been extravagant. But, after all, there must have been great apprehension and great loss—loss not in the waste of property, it is true, but in the failure to make accustomed or anticipated profits. The wheels of production and traffic

paused or slackened in their round, while the citizens were contending for the offices; paused or slackened not from fear of danger from abroad or of violence within, but simply from fear of the result of a peaceful strife, in which our own people were engaged among themselves; to be decided by the preponderance of votes, and to be followed, as everybody believed, by quiet acquiescence.

Nevertheless, this suspense appeared so calamitous in the eyes of many citizens that amendments of the Constitution began to be talked of as remedies, such as the lengthening of the presidential term of office to six years and making the incumbent ineligible for a second term; as if those remedies would reach the evil. Were quiet the only thing to be aimed at, ten years would be better than six, and a life term better than either, saving that upheaval which would be sure to occur at the death of every holder, and from which there would be no refuge but in hereditary descent, a measure as abhorrent to our traditions and our sentiments as to our reason and our education. And as to ineligibility for a second term, there would be some advantage, no doubt, as it would remove from the office a temptation to which the possessor for the time being has not always proved himself superior. But, for reasons which will appear hereafter, the presidential office is not the only element in the disturbances from which the business of the country suffers at a general election. The other element is in Congress, and nobody thinks of giving its members a longer term of office.

Is the agitation of a presidential election, after all, an evil, and if an evil, is it a dangerous one? The interest which a free people take in their elections is a good thing in itself, and the excitement which it occasions may lead to the purification of the political atmosphere, and so far be useful. It is excess and the tendency to excess which are to be feared and guarded against. The framers of the Constitution, apprehending evil and danger, resorted to the expedient of a body of electors chosen in each State, each body voting separately, and transmitting its votes to a central authority. This expedient has proved to be unavailing. What, then, observing the present methods, should we say about the evil and the danger? They



who saw the inside workings of the presidential canvass of 1876-'77 will be the first to answer, that there is danger ahead. They best know, though the whole country may not know, how near we came to a violent conflict in the eventful crisis. That, however, was but one illustration of what the history of the world, in its whole current, tends to make manifest, that the election of a Chief Magistrate, whose power is to be great, and whose tenure of office long, will always be an occasion for agitation, dangerous in proportion to the power. Mr. Jefferson's letter to Mr. Madison, written in 1787, about the new Constitution, shows the apprehension which then existed. We have now, it is estimated, seventy millions of people, divided among forty-two States. A hundred years from now we shall have, according to the usual rate of increase, from five hundred to a thousand millions, and perhaps sixty or it may be one hundred States. What will then happen? Is there not a speck, even though no bigger than a man's hand, visible in the horizon, which may prove the precursor of a cyclone? Reflecting on these things, what does it become us to do? This becomes us, to look into the causes of the dangerous agitation, to put them out of the way, and if we find that these causes are evils in themselves, apart from the evil consequences which they produce, we shall find still greater reason to beware of them.

It is not, after all, the effect of suspense upon business that we are most concerned with, in considering a presidential election, but the fact of the injurious suspense itself. What is the explanation of this phenomenon? None other than that the personal and private interests of great numbers of persons depended, as they thought, upon the result of the election, either as office-holders or as office-seekers, or as citizens in quest of special privileges, such as charters, monopolies, contracts, or other advantages of like parentage. What different motive can be suggested for the zeal with which so many labored, the money which so many spent, the frantic appeals to the electors with which the air resounded, the defamation and the falsehoods which burdened so many of the journals, and the bribery for which men of substance supplied the money, and at which men of good



repute were not ashamed to wink? This all came from the belief sometimes taught and more frequently acted upon, that public powers can be rightfully used for private ends, and from the disposition thence fostered to use the machinery of government, the most potent of all the machinery known to the world, for the advancement of individuals in place or possessions. Hence the strife to get control of the government, and from that strife the consequences at which our friends over the sea shake their heads, and to which we must not shut our eyes. To each of them I would give some attention; not, indeed, so much as a full discussion would require, but as much as the necessary limits of this paper will allow; and in doing this I shall exercise the right of an American citizen to speak as I think.

One of our journals, shortly after the presidential election, discoursed in this way: "Millions for votes; money, not principle, the great lever in Federal elections as now conducted in the United States; men bought, sold, and traded for, like sheep or potatoes in a market." Another journal had the following: "Regarding the cost of presidential elections, it is variously and unauthoritatively given out that the enormous sum of from three millions to five millions was spent in election expenses for documents, speakers, tickets, and 'incidentals,' the latter being mysterious and comprising the bulk of the whole." Still another journal declared that "politics is fast drifting into a game of money; the candidate who can muster the most being pretty sure to win." The journal first mentioned published a letter from a correspondent in Indiana, containing this incident of the election: "None of us who were working the voters handled any money. Two men were given the bag to hold, and they went into an upper room which had been used for gambling and had a little wicket in the door. Once inside, they kept themselves out of sight. The workers handed the voter a ticket, and saw him give it to the judge of election; then we gave the voter a little check with marks on it, which the two men in the gambling-room up-stairs would understand. The checks were little pieces of pasteboard. If we had bought a man for five dollars we put V on the check, if the price was

ten dollars we put an X, and if it was twenty we put XX. The voter took the check up-stairs, shoved it through the hole in the door, and got his money. The bag gave out in my place four times that day, and I went and got more money each time." No wonder that the journal which published the letter followed it with this comment: "Unless this evil is met and checked, it will grow. The use of money in the late canvass became universal, profligate, disgraceful. The honest, simple, necessary expenses of an election are readily known. We object to the debauchery of the franchise by the corrupt disbursement of money. And it is an objection which affects the life of the nation."

Here let us pause and ask: Were these things so? Were these passages from the newspapers pictures of realities, or the flashes of a sensational press? For an answer, look at the circular sent out during the canvass in Indiana by one of the managers of elections, in which these instructions were given: "Divide the floaters into blocks of five, and put a trusted man with necessary funds in charge of these five, and make him responsible that none get away, and that all vote our ticket. . . . There will be no doubt of your receiving the necessary assistance through the national, State, and county committees, only see that it is husbanded and made to produce results."

How many voters were bribed, and by which party, it matters not to say. It suffices that in New York, out of a vote of 1,300,000, the majority was only about 14,000, and a change of 8,000 votes would have changed the result. One purchased vote in every 160 may have determined the majority. A like result from a like cause may have determined the election in Indiana. The total number of votes cast for Mr. Cleveland in all the States was 5,586,242; for Mr. Harrison 5,440,708, and there were about 400,000 votes for various other candidates. Mr. Cleveland's votes in excess of Mr. Harrison's were therefore nearly 150,000, though each was in a minority of all the votes of the country; but as the voting in the electoral colleges was by States, great majorities in some of them were overcome by smaller majorities in others, and a slight change in a few of these would have

changed the majorities in the electoral colleges. An election thus fought and won may possibly have been decided by bribery! Has anybody been punished for the crime?

So much for the corruption of voters; let us now see what can be said of the corruption of officials. What do we mean when we speak of official corruption? Nobody believes that the judgments of the courts are purchased or purchasable. Nobody believes that any President of the United States has been corrupt. Nobody believes that the Governor of any State is corrupt. Nobody believes that the majority of the members of Congress or of a State Legislature are corrupt. Nobody believes that the majority of executive or administrative offices in the State or nation are held by corrupt men or are corruptly administered. What, then, is meant by official corruption? This is meant, that there is a purchasable contingent in certain of our State Legislatures, and sometimes even in Congress, sufficient to determine the vote of the body on a close division, and sufficient to levy tribute on rich corporations, as the price of peace, annual or biennial; and this also is meant, that among the administrative officers of the State and nation, there are some, a small minority, no doubt, whose favors are purchasable also. When I say purchasable, I do not mean that money is always paid in such transactions, but that a valuable return in money or patronage or jobs is given for the service. All, however, may be called, as they truly are, purchases and sales.

That there is such corruption as I have described is universally believed. Ask any intelligent citizen, and he will answer that he has no doubt of it. He may not be able to tell who the offenders are, or how many, but he will give you his belief on the strongest grounds of moral evidence. These things are not pleasant to see; but if they exist, if they are visible at all, it is the part of every true patriot, every courageous man, to look them in the face, talk about them, write about them, and bestir himself about them, until the plague is stayed. How, indeed, can the abuses be stopped if men will not talk about them? Picture the enormity of the offense in the strongest colors, and proclaim from the house-tops that he who, either as voter or as officer, gives or receives a bribe in



any form should be accursed of men, as he is accursed of God, and that the stain which discolours him must be reflected upon every person, high or low, who profits by his crime. We have used, heretofore, too much gentleness in our reproaches. Our language has imitated the style of an indulgent father to a spoiled child: "That is very naughty of you, my dear boy; but don't do it again."

Does any one doubt that offices are sometimes bartered for votes? Every treatise on American politics gives a chapter to that opprobrious system commonly called by an opprobrious name, "The Spoils System." That offices should be called spoils is bad enough, as though the contending parties of the same commonwealth were at war with one another. The eminent statesman who, in a flippant moment, invented the unlucky phrase, "To the victors belong the spoils," little foresaw into what a depth of vexation and humiliation he was helping to lead his countrymen. The practice had begun, indeed, long before, and I believe in our foremost State—New York. The practice has now begotten a new name—"Practical Politics." Practical, indeed! We see occasionally, on sign-boards, practical plumber, practical tailor, practical horse-shoer; but practical politician is a new phrase. The alliteration may have recommended it. Would not "Plundering Politics" do as well? Politics once had a different meaning. Gouverneur Morris, writing to Washington about Necker, observed, "He is utterly ignorant also of politics, by which I mean politics in the great sense, as that sublime science which embraces for its object the happiness of mankind." In our day, politician has come to be a term of reproach, and to mean one who deals in votes. Civil-service reform has undertaken to grapple with the system, but it is to be feared that something stronger than competitive examinations will have to be evoked before the evil is extinguished. Let one for a few moments reflect on what the spoils system involves. I heard President Garfield, in a public address a few years before his election to the presidency, declare that there were a hundred thousand office-holders under the Government of the United States. An examination of the official register, containing a list of the officers and employés in the civil, military, and naval

service of the United States on the 1st of July, 1887, shows that the total number of persons in the service, exclusive of soldiers and sailors, was 141,515. Of these, 88,805 were in the post-office department and the postal service, and 2,593 in the judicial department; the rest in the legislative and executive departments.

Nearly all of the executive and administrative offices under the Federal Government are held at the pleasure of the appointing power, and the spoils system has been carried to such an extent that removals may be made, and are in fact often made, in order to create vacancies to be filled by partisans.

We are thus confronted with a new plague: abuse of the power to remove an officer whose term of office is during pleasure. This is quite different from the abuse of power to fill a vacancy. To make a vacancy is one thing, to fill it is another. It is possible that a vacancy may be creditably filled, after a very discreditable forcing of the vacancy; the appointment may have been one fit to be made, the displacement very unfit.

A Washington journal early in April (it must be remembered that the new President came in on the 4th of March) contained the following announcement:

The First Assistant Postmaster-General, during the present week, has averaged 150 appointments a day of fourth-class postmasters. There are in the service 54,000 postmasters of this class. By a simple calculation it will be seen that if the First Assistant Postmaster-General can keep up the pace, there will be an entire reorganization of the fourth-class postmasters inside of the next twelve months. The work in this direction is greatly facilitated by members of Congress. They send in recommendations in batches covering from a dozen to twenty-five offices, and, as the department has been uniformly guided by the recommendations of members in these appointments, the duties of the First Assistant Postmaster-General, in making the changes, are more of a ministerial than of a discretionary character. Mr. Payson, of Illinois, has topped the record by submitting a batch of 175 names in one day.

Another account of the raid upon the post-offices is given in the following extract from the letter of a Washington correspondent to a New York journal:

The would-be postmasters range in number from two up to 75 and 100 for each office. It is estimated at the Department that a fair average would be six for each office, great and small. In the State of New York there are, in round numbers, 3,200 post-offices, and an average of six applicants to each office makes over 19,000 would-be postmasters in that State alone. New Jersey has about 800 offices and 4,800 applicants, and Connecticut has nearly 500 offices, wanted by 3,000 Republicans. Including the Territories, whose citizens are as ready to accept office as those of any State, there are over 57,000 post-offices in the United States. The department estimate of six applicants for each office gives the amazing total of 342,000 persons who are seeking postmasterships under President Harrison's administration, and of whom 285,000 must necessarily be disappointed.

The report of the present Postmaster-General is made up to the end of June, and covers therefore only a period of a little less than four months. It professes to give "*some* statistics of appointments, resignations, and removals," but what the other statistics may be does not appear. From those given it seems that in the presidential post-offices there were 136 removals between March 4th and July 1st, of which the holders of 23 had served over four years, and "22 others had an average service of nearly four years." The total number of removals in all classes of post-offices is given as 7,853, between July, 1888, and July, 1889, but how many of these were between March 4th and July 1st, 1889, is not stated; nevertheless, as there were only 1,244 removals between July, 1887, and July, 1888, and the two thirds of these would make only 829, and it is fair to assume that the outgoing administration would make no more removals in its last eight months than in the eight months of the previous year, we may reasonably infer that 7,024 postmasters must have been removed between March 4th and July 1st, 1889. But the whole statement is so cloudy, that I confess myself unable to get any satisfactory information from it respecting the number of removals by the present administration.

In September, 1889, within seven months from the inauguration of the new President, it was announced in one of our journals that fifteen thousand removals had been made in the first five months; and, in another journal, that in the railway mail service, between the 4th of March and the 1st of July,



no fewer than 2,484 persons were discharged, nearly all of them solely because they were Democrats. In the same September the President of the Pennsylvania Republican Association, in Washington, a colored citizen it is said, uttered a lamentation over the slowness of removals, in language so gross that I will not admit it into the body of this paper; but, that it may not be overlooked, I place it in a note as a standing testimony against the nauseating foulness of the "spoils system." \*

Could anything have been uttered more revolting to an American citizen, whose eyes have not been blinded by the zeal of party? An office is created for public service and for the benefit of all citizens, and the incumbent should in reason be the one who can best serve all the citizens. Nepotism has no place in a republic; favoritism has none. The needs of the service and the fitness of the servant are the only quantities to be measured and compared. A change of administration may or may not imply a change of policy, in respect of certain public measures which are possible within the limits of the Constitution, but it ought not to imply more; and when such a change is implied, no officials of any description other than those employed in carrying out the policy should be subject to removal. Surely postmasters are not within the category of such officials, and it looks like a scene in *opéra-bouffe* for an administration which, though placed in office by a majority of votes in the electoral colleges, could count on its side but a minority of the individual voters of the country, to turn out incumbents, who not only have served the public well, but hold, we may well believe, the sympathies of more than half the people. Is this a government of the people, by the people, and for the peo-

\* Mr. S. R. Stratton, the President of the Pennsylvania Republican Association, said: "I am constantly reminded on the street and elsewhere that we have met the enemy, and we are theirs; that the spoils of victory are in the hands of the enemy to an alarming extent; that the still sow drinks the official swill, and that these still sows are a part and parcel of the Democratic herd, bequeathed as a legacy to the Republican party by his late Eminent Highness Grover the First—and the last; that this pork is fat enough to kill, and that it ought to be disposed of while the official knife is sharp and the water hot, so as to give place to a few of the lean and hungry Republican shoats, who have been rooting and digging for the last four years in hope to get a whack at Uncle Sam's crib before the corn is all gone."

ple? The postal service, of all others, should be divorced from politics. The members of Congress from the district have of right no relations with it. Promotion should follow good work, and nothing else. Why might not the postal service be non-partisan as well as service in the judiciary, or in the army, navy, or in the police of cities?

In March, 1867, in order to tie the hands of President Johnson, Congress passed an "act regulating the terms of certain civil offices." This act affected only Cabinet officers. It was amended in April, 1869, in order to untie the hands of President Grant. As the law now stands in the Revised Statutes, sections 1,767 to 1,770, any person holding civil office, by appointment of the President, with the consent of the Senate, may hold to the end of his term, unless sooner removed with the Senate's consent. These provisions leave all officers appointed by inferior authority to the absolute will or caprice of the appointing officer, or of those who control him. Surely it would not be difficult so to regulate the terms of every such office that it would be impossible to remove the holder for party reasons.

Half a century ago, Horace Bushnell, one of our most eminent divines, uttered this protest against the infamous system of the "spoils":

"Now this doctrine, which proposes to give the spoils to the victors, has been imputed mostly to one of our political parties, and, as some suppose, has been avowed by that party. . . . We shall see, perhaps, how far the opposing party will abjure this doctrine of the spoils, and whether it is not yet to be the universal doctrine of politics in the land. If so, then shall we have a scene in this land never before exhibited on earth, one which would destroy the integrity and sink the morality of a nation of angels. . . . Only conceive such a lure held out to this great people, and all the little offices of the government thus set up for the price of the victory, without regard to merit or anything but party service, and you have a spectacle of baseness and rapacity such as was never seen before. No preaching of the gospel in our land, no parental discipline, no schools, not all the machinery of virtue together, can long be a match for the

corrupting power of our political strifes actuated by such a law as this. It would make us a nation of apostates at the foot of Sinai."

A feeble attempt has been made to shelter the removals and appointments under the great names of Washington and Jefferson. But does any sane man believe that they would have sanctioned the scenes here described? There is nothing in any act of their official lives, nothing that either of them has said or written, which would make us believe that they would have given them the slightest countenance.\*

It may be said that, after all the changes, many of the old officers are left undisturbed. This is true, no doubt, but the removals which are made render the term of every officer insecure; every incumbent, high or low, has the threatening

\* Here are extracts from the letters of Washington and Jefferson, which have been thrust into the defence of the spoils system :

FROM WASHINGTON TO TIMOTHY PICKERING, SECRETARY OF WAR.

"MOUNT VERNON, *September 27, 1795.*

" . . . With respect to Mr. D—— for the office of Attorney-General, although I have a very good opinion of his abilities, and know nothing of his moral character or connections that is objectionable, yet the reason I assigned when his name was first mentioned to me has still weight in my mind; that is, after a long and severely contested election, he could not obtain a majority of suffrages in the district he formerly represented. In this instance, then, the sense of his constituents representing him personally has been fairly taken; and one of the charges against me relative to the treaty, you know, is, that I have disregarded the voice of the people; that voice has never yet been heard, unless the misrepresentations of party, or at best partial meetings, can be called so.

"I shall not, while I have the honor to administer the government, bring a man into any office of consequence knowingly whose political tenets are adverse to the measures which the General Government are pursuing; for this, in my opinion, would be a sort of political suicide. That it would embarrass its movements is most certain. But of two men equally well affected to the true interests of their country, of equal abilities and equally disposed to lend their support, it is the part of prudence to give the preference to him against whom the least clamor can be excited. For such a one my inquiries have been made, and are still making. How far I shall succeed is at this moment problematical."

FROM JEFFERSON TO COLONEL MONROE.

"WASHINGTON, *March 7, 1801.*

" . . . I have firmly refused to follow the counsels of those who have desired the giving of offices to some of their leaders in order to reconcile. I have given, and will give, only to Republicans, under existing circumstances. But I believe



shadow hanging before his eyes, and the removals are sufficient to tempt office-seekers all over the land. It is computed that during the Reign of Terror in France only about four thousand persons perished on the guillotine; but these were enough to place the ghastly specter before the eyes of twenty millions of Frenchmen.

Suppose, however, that not more than one postmaster in a hundred has been removed for party reasons, is the heinousness of the crime to be measured by the number of victims? One murder is as great an offense against law and morals as

with others that deprivation of office, if made on the ground of political principle alone, would revolt our new converts, and give a body to leaders who have to stand alone. Some I know must be made, they must be as few as possible, done gradually, and bottomed on some malversation or inherent disqualification.

TO WILLIAM B. GILES.

“WASHINGTON, *March 23, 1801.*

“ . . . But there is another branch of duty which I must meet with courage too, though I can not without pain—that is, the appointments and disappointments as to offices. Madison and Gallatin being still absent, we have not yet decided on our rules of conduct as to these. That some ought to be removed from office and that all ought not, all mankind will agree. Where to draw the line no two will agree. Consequently, nothing like a general approbation on this subject can be looked for. Some principles have been the subject of conversation but not of determination; e. g., 1. All appointments to *civil offices during pleasure* made after the event of the election was certainly known to Mr. Adams, are considered as nullities. I do not view the persons appointed as even candidates for the office, but make others without noticing or notifying them. Mr. Adams’s best friends have agreed this is right. 2. Officers who have been guilty of official misconduct are proper subjects of removal. 3. Good men, to whom there is no objection but a difference of political principle, practiced on only as far as the rights of a private citizen will justify, are not proper subjects of removal, except in the case of attorneys and marshals. The courts being so decidedly Federal and irremovable, it is believed that Republican attorneys and marshals, being doors of entrance into the court, are indispensably necessary as a shield to the Republican part of our fellow-citizens which I believe is the main body of the people.”

TO DR. RUSH.

“WASHINGTON, *March 24, 1801.*

“ . . . Of the thousands of officers, therefore, in the United States a very few individuals only, probably not twenty, will be removed; and these only for doing what they ought not to have done.”

TO JAMES MADISON.

PARIS, *December 20, 1787.*

“ . . . The second feature I dislike, and strongly dislike, is the abandonment, in every instance, of the principle of rotation in office, most particularly in the

twenty, though the injury to society in the latter case may be twenty times greater. If my neighbor is a Republican, while I am a Democrat, and I, holding an office, am removed because I voted with my party, and he is appointed in my place because he voted the other way, the official who removed me and appointed him is a criminal, call him by what name or office you please.

case of President. Reason and experience tell us that the first magistrate will always be re-elected if he may be re-elected. He is then an officer for life. Thus once observed, it becomes of so much consequence to certain nations, to have a friend or foe at the head of our affairs, that they will interfere with money and with arms. Galloman or Angloman will be supported by the nation he befriends. If once elected and at the second or third election outvoted by one or two votes, he will pretend false votes, foul play, hold possession of the reins of government, be supported by the States voting for him, especially if they are central ones, lying in a compact body themselves, and separating their opponents, and they will be aided by one nation in Europe, while the majority are aided by another. The election of a President of America, ~~some~~ years hence, will be much more interesting to certain nations of Europe, than ever the election of a King of Poland was. Reflect on all the instances in history, ancient and modern, of elective monarchies, and say if they do not give foundation for my fears: the Roman emperors, the popes, while they were of any importance, the German emperors till they became hereditary in practice, the Kings of Poland, the Deys of the Ottoman dependencies. It may be said that, if elections are to be attended with these disorders, the less frequently they are repeated the better. But experience says that, to free them from disorder, they must be rendered less interesting by a necessity of change. No foreign, however, nor domestic party will waste their blood and money to elect a person who must go out at the end of a short period."

Washington's letter contains not a word about *removals*, and, in respect of appointments, he was writing about a Cabinet officer, Attorney-General, and he refers afterward only to offices of *consequence*. Jefferson says that "good men, to whom there is no objection but a difference of political principle, practiced on only as far as the rights of a private citizen will justify, are not proper subjects of removal, except in the case of attorneys and marshals," and these are excepted for reasons no longer applicable.

Again: "Of the thousands of officers, therefore, in the United States a very few individuals only, probably not twenty, will be removed; and these only for doing what they ought not to have done."

Commenting on the spoils system in American politics, "The Contemporary Review," in October, 1881, made this observation:

"Jefferson seems to have made greater innovations, for in his eight years of office he removed thirty-nine officials; but he repeatedly declared that the removals were effected on solid and substantial grounds, and not for political reasons. Nor would Jefferson appoint any man to office who was a relative of his own."

The spoils system is at once a breach of the Constitution and a breach of faith; a temptation to corrupt methods in obtaining, and to malversation in holding, office. Let us see if this can not be made plain.

The superior officer who appoints, and the inferior officer who is appointed by him, are both servants of the whole people, not of a part of them; my servants as well as yours. The former has no right to appoint a man to suit himself or his party any more than to suit me; he was not elected for any such purpose, or clothed with any such right. If an article had been found in the Federal Constitution, when it was presented to the States, in some such form as this, "All officers appointed by the President shall hold office during his pleasure, their commissions shall expire at the end of his term, and his appointments shall be made from the party which elected him," that Constitution would have had as little chance of ratification as if, instead of providing for a president, it had provided for an emperor. But, strange to say, the politicians have interpolated an article not very unlike into that instrument, during the first century of its existence. May it be our happy lot to expunge the interpolation!

The shifting back and forth of officers at every turn of an election has no precedent and no parallel, so far as I know, in any part of the civilized world. I have never heard an American seriously defend it; I have never heard one speak of it who did not deplore it. Its existence at all, and especially its existence for so many years, serves only to show what a hold the politicians have had upon the throat of the American people. There is a game at which children love to play, called "grab-bag," where a bag filled with toys is held before a blindfolded child, who thrusts in the hand at random and seizes whatever it happens to feel; but there is this difference between the grab-bag of the children and the grab-bag of the politicians, that in the former only one child at a time has a chance, whereas the politicians all thrust in their hands at once. If the grab-bag be not a fair illustration, perhaps the loot of the Chinese emperor's palace at Peking would do, only that there the English and French took a fair start before breaking into a run for the imperial treasures. Is it a very



improbable supposition that, if one of our chief officers had been an African explorer, a new administration would have turned out Stanley and appointed in his place the hardest worker in the canvass; the one who had done what they call yeoman service in the battles of the ballot-boxes, or had been the largest contributor to the campaign fund, as the one to whom the appointment rightfully belonged for his share in the spoils of office; the fittest one, therefore, to be substituted for the man who has won the admiration of three continents by his heroic daring in the fourth?

I have heard it hinted rather than asserted—for I do not remember ever to have heard a man of ordinary sagacity assert—that a party could not be kept together in this country without promise of the spoils. If that be so, what would such a reason imply? Simply that an American has so little public spirit that he can not choose his party without counting the spoils, and that party in America is nothing but a conspiracy to get possession of the offices. “In the morning they devour the prey, and at night they divide the spoil.” Is there an American who is willing to admit this? How are parties kept together in other countries? In none of them is there such a periodical turn of overthrow, and at such short periods as in our own favored land, but they have parties nevertheless, and as many of them probably as is consistent with fair government. Surely the good sense of this people, if not their sense of safety, should impel them to set their heels upon this adder’s head and stamp it to death. It is a standing reproach to our civilization. If we could imagine a community separated from the rest of the world—a million souls, with ten thousand office-holders; that is, one to every hundred persons—the proportion of office-holders to citizens less than in this country—and we were told that by the custom of that community the office-holders were shifted from one side to another whenever an election disclosed a majority, however small, adverse to the majority of the previous election, we should pronounce that community to be a rival of Bedlam.

How, indeed, after all, does the practice differ from a sale of the offices? They are given as rewards for votes, and that is barter. A politician—that is, a dealer in that species of

traffic—gives so many votes, or so much money to purchase votes, and claims in return the spoils of office. This is understood beforehand. He who procures the most votes, or gives the most money, claims the best office, and commonly gets it, or nominates the man who does get it. This is a sale or barter of the office, call the transaction by what name you will.

To such an extent has the greed of office prevailed, that for years Congress has neglected its duty of relieving the Supreme Court from unnecessary burdens, for the reason that a particular party would thereby gain the advantage, such as it might be, of having several new judgeships at its disposal; and we have seen the unseemly spectacle of state senators and city aldermen refusing to consider important nominations, because they might, by refusing, thereby retain their own partisans in office, through the device of holding over until the appointment of successors.

The practice of the "spoils system" is, as I have said, a breach of faith. Who shall say that an election to office, one of whose functions it is to appoint the holders of inferior offices, does not establish a confidential relation on the part of the person elected? With whom, then, is the relation established? Not alone with those who elected him, but with the whole people. He is no more the servant of his party than is the person whom he may have appointed to an inferior office his personal servant. It follows that a removal from a non-political office for any reason other than unfitness is one breach of faith, and that an appointment for any reason other than fitness is another. The question of fitness is the only question to be considered. The element of partisan service is a poisonous element, dangerous in proportion to its extent. In all this, however, I am speaking only of administrative officers, and not of those principal executive functionaries whose province it is to represent the nation in dealing with other nations, or to enforce its policy in the execution of its laws. In respect of these I admit that an administration may appoint those, and those only, who are in sympathy with it. The administrative officers—and they are in number nearly ninety-nine hundredths of the whole—are those in respect of which I insist that our practice is a violation of our theory,

and that it is as dangerous as it is disreputable, and as disreputable as it is dangerous. In this category are to be included, among others, all the revenue and customs offices, all the consulates, and all the offices of the postal service. In respect of these, what reasons could justify a removal? Nothing but the incapacity or unfaithfulness of the incumbent, or the probability of obtaining another equally faithful and more capable. Getting votes in nominating conventions or in elections is not the function of any officer known to our laws, and, for that reason, it should not enter as an element into the question either of removal or appointment.

The spoils system tends to demoralize public servants. How can it be otherwise? It is the law of our nature that the servant will look to his master, whatever may be his own secret wishes; and so long as the politicians are the masters of a public servant so long will the politicians control him, servant of the people though he be. "Ye can not serve two masters" is Holy Writ and the world's wisdom. The spoils system is contrary to the methods of all efficient service and contrary to the practice of all corporations and of all successful citizens.

It tends to official and private corruption. The scandals it obtrudes upon society are examples of alarming significance. Private morals will not long continue pure after public morals are corrupted. In short, the spoils system begets the prostitution of the appointing power, the demoralization of the service, and the corruption of the voter. To expect a quiet canvass or an honest election with all the spoils set up as prizes for the victors, is not more rational than to expect a smooth sea when a cyclone is sweeping across the face of the waters. The offer of an office to the voter is a perpetual temptation, a standing bribe, held out by the highest authority in the land, the government of the country. Is it any wonder, then, that bribery should be looked upon as a trivial offense?

A still further argument is the interchange, or rather the commingling of functions which the spoils system now makes between the legislative and executive departments, contrary to the plainest principles of the Constitution. That instru-



ment requires the President to nominate, and with consent of the Senate appoint, the subordinate executive officers, excepting those whose appointment Congress may vest in inferior hands. But now, by a strange introversion of functions, the Senate, in instances innumerable, dictates to the President whom he shall nominate, and the representatives, seeing how the method works, take a hand themselves; and so, in reality though not in pretense, Congress has practically usurped, in all these instances, the executive office.

Turn we now from office to privilege, from the executive department to the legislative. If we assume, as I think for consistency we ought, that the true function of republican legislation is to enact general and equal laws, we find much to complain of in the action of Congress.

In the volume containing the acts and resolutions of the second session of the Forty-ninth Congress, which session began on the 6th of December, 1886, and ended on the 3d of March, 1887—a period of eighty-eight days—there are contained 397 public acts, 22 public resolutions, and 457 private acts—that is to say, 38 more private acts than public acts and resolutions together. This is not all, for, in the acts and resolutions classed as public, there are at least 100 of no public importance whatever.

It may not be amiss to compare this legislation with that of Great Britain, as explained in these opening sentences of an article in the "Nineteenth Century" Review for March, 1889:

In the last year's session of the British Parliament, 334 bills were brought in and read a first time in order to be printed. Of these, 72 were introduced by ministers, 262 by private members. The Government carried 43 of their measures, the majority being of second- and third-rate importance. Private members, struggling from February to Christmas-eve, have managed to carry 23 bills through all their stages, 239 being left among the wreck of the session. Of the total number of these bills brought in, 66 received the royal assent, 268 being either thrown out or dropped.

Of all the mistakes of Congress, the greatest, in my judgment, is its undertaking to regulate the industry of the country. Here it has entered upon a career full of perplexity and

full of danger. I do not speak of the economical question. The objection which I find to the intervention of Congress is that it violates that principle of equality which lies at the foundation of our theory of government, and it must in the end, if persisted in, lead to political complications that will endanger the existence of the government. It is impossible to do, with any approach to equity, or even the appearance of equity, that which Congress undertakes to do, and this is an all-sufficient reason why the undertaking should not be made.

Let us read a lesson out of the great book of nature—a lesson which teaches us that sane persons of mature age are able to take better care of themselves than their neighbors can do it for them. If, in pursuit of that happiness which is the inherent right of every human being, the town meeting where one happens to live can not rightfully or wisely restrain him, constraint can acquire no sanctity through its exercise by a state or national assembly. Managing the commissariat of a large army is one of the most difficult of the operations of war. If any political society should ever become so devoid of common sense as to take into its own hands the provisioning of all its members, the rest of the world would laugh at its folly, and the members would probably starve. Suppose the New York aldermen were commissioned to feed all the people of that city, and to that end were to send to Chicago for the beef, to Cincinnati for the pork, to Vermont for the mutton, to New Jersey for the vegetables, and to Delaware for the fruit, how outsiders would deride, and how New-Yorkers would suffer! The same reason, in a less degree, forbids the attempt by the majority of a community to control the daily living and the employment of its members. Now the system, variously named protection to industry, tariff on imports, or monopoly, is but another, a milder form, it is true, of the same thing, which, in the case supposed, would be laughed at and make its victims miserable. We have fallen into an interval of delirium on the subject, a sort of craze, like the South-Sea bubble in England, the tulip mania in Holland, the timber-land fever in Maine, the *Morus multi-caulis* madness in New York.

The number of imported articles taxed under the present tariff of 1883 is from 1,500 to 2,000, regarding as different articles different products of the same material—for instance, the different manufactures of wool. What a fluctuation of values, what an oscillation of prices, present and prospective, the successive manipulations of such a tariff, amid the conflicting clamors of producers and consumers, capitalists and workmen, must occasion, can be understood only when the details are studied. One article alone will suffice for illustration: Silk was taxed 24 per cent on its value in 1860, 60 per cent in 1869, and 50 per cent in 1883.

Prices are thus kept in continual fluctuation, not from natural but artificial causes. Each article has, of course, its own group of manufacturers or dealers, all of whom are held in suspense until it is decided by popular election whether there is to be a change. Supposing the number of articles taxed for the purpose of affecting their prices to be only 1,500, and each group of manufacturers and dealers to be 1,000—which I should think must be a low estimate—we count a million and a half of voters who have for this cause alone a pecuniary interest in the result of the election. Add to these the hundred and forty thousand office-holders, in suspense for fear of losing their places, and the mightier host in hopes of gaining them, and the contending forces swell to an exceeding great army, enough to keep the country in an uproar from the day of nomination to the going down of the sun on the day of election.

My contention is that, whatever be the economical reasons on which this policy rests, whether the aggregate wealth of the country may or may not be made larger by it, our practice is at war with our theory, and, if persisted in, will in the end be fatal to republican government, because it invests the law-maker with a power which can not be safely intrusted to any law-maker whomsoever, and because, moreover, it strikes at the root of that equality on which our institutions rest, infringing the inherent and inalienable right of every man to deal with whom he pleases and where he pleases, so long as he does not infringe the equal right of another.

The theory of the present tariff—I am not speaking of a



tariff for revenue, but of a tariff for protection—is that the Government may and should regulate the prices of commodities which are imported from other countries, but which we can ourselves manufacture. The argument against it is not a long one, but it appears to me unanswerable. This tariff for protection is laid in order to protect the American manufacturer from foreign competition by raising, for the time being, the price of the imported commodity; in other words, the object is to raise the price of certain kinds of property. I insist that such is not a legitimate function of any government, and, least of all, of an American government. It is not an answer to say that the object is not to enhance the price of all kinds of property, but only of a few kinds; nevertheless, the power over one kind is the power over all, and if it can reach one it can be made to reach another, should those who legislate be persuaded by any person or motive to embrace the other. The power to raise or regulate the price of any article can be defended only as a power to raise or regulate, according to circumstances, the price of all, whether it be lands or chattels or labor. It is, moreover, no answer to say that the power, if it exists, will not be exercised. Who can tell? Once admit that the major part of the people have the power, in the name of law, to raise or lower the value or price of the property of the minority, or of any part of the same people, and it follows that they have the power to play the tyrant and confiscate as they will and what they will.

The fluctuation, inseparable from the policy, keeps us in never-ending turmoil. There can be no certainty in the forecasts of business. Instability would be our condition with all its consequences. "Unstable as water, thou shalt not excel." Certainty is impossible, and that impossibility it is which keeps the country in perpetual anxiety. We are now, in January, 1890, in the first months of a new Congress, and we begin to see the gathering of the hosts of lobbyists careering about the Capitol, and at the other end of Pennsylvania Avenue the hosts of office-seekers careering about the White House—the seekers after privilege at the one end of the avenue, and the seekers after office at the other end—both hosts clamorous and insatiable.

A consequence of the mistaken policy upon which we have entered is the perversion of the taxing power to other purposes than the raising of money for public expenditure. Wasteful expenditure is the natural consequence. The two, as it happens by a marvelous fatality, do not proceed side by side, for at present, contrary to all experience, excessive taxation, as if in mocking bravado, runs faster than the wasteful expenditure, and, to such an extent that the Federal treasury has at this moment a surplus of a hundred million dollars or so, with which we know not what to do. At the last session of Congress, seventeen million dollars (in round numbers) were appropriated to the maintenance of a navy, counting a tonnage not one twentieth that of the navy of Great Britain, which employs over 62,000 seamen and marines, and for which the parliamentary grant last year was thirteen million pounds sterling; and thirty-eight million dollars were voted by Congress for the maintenance of our army of 25,000 men, while the British provision for an army of nearly 200,000 men, besides volunteers and militia, was a little less than seventeen million pounds sterling. At the same session of Congress eighty million dollars were appropriated for pensions, issued to such an extent and on such pretences as to have become a public scandal.

Let us review the situation. With all our prosperity and all our successes, we have lapsed into grave abuses. What is the cause? Why the excitement of the presidential election? Why the vehemence of the canvass, and the charges of corruption which filled the air as the work went on? I have endeavored to show that it was because the result of the election had become a matter of so much consequence to so many people. Was there need of this—that is, was there any reason why an election for President and members of Congress should have been of such importance? There was no question of foreign relations depending, none of dissensions between the States, and if the nation had been content to follow in the path marked out by the text of its Constitution and the theory of its government, there would have been, I am confident, no such excitement, no such charges of corruption, and no such disturbance of the business of the

country. Why, then, did the American people depart from their safe and ancient ways? The answer to this question will solve the riddle of American politics. That answer is in a few words: that a popular election with us has in a great degree ceased to be a struggle for policy and become a struggle for office and privilege.

The two practices combined, one of giving public offices as public spoils to the victors in an election, and the other of converting legislation from its proper function of enacting general and equal laws to the granting of privileges and favors or making discriminations between one citizen or class of citizens and another—these two practices are the causes of all or nearly all the disturbance, misgovernment, and corruption which disfigure our political life, and give rise to the reproaches of friends and enemies the world over. How can it be otherwise than that an election, with its concomitants, as now witnessed, should disturb the quiet of the country, madden the strife of party, stimulate the exertions of those whose livelihood or means of profit may depend upon the issue; of those who see, or fancy that they see, in the chances of the canvass the gain or loss of office or of privilege; of all those, indeed, whose property or means of property may rise or fall as the pendulum swings from side to side.

Shall it ever be said with truth that our government has come to be the arbiter of prices, the dispenser of riches, the fortress of privilege? But have we not for some time been drifting that way? We constantly intermeddle and overdo. If any two words could express our besetting sins they would be the words "intermeddling" and "overdoing." We stretch and overdo the functions of government. We usurp the functions of the individual citizen, and we put too great a strain upon the body politic.

In using the word politician I have taken it in its worst and most odious sense. But I would not forget that there is still that other sense, which Morris described, and in which the Athenians practiced it, and to which many public men among us conform their lives. Partisan is not mainly nor naturally a term of reproach. A free government must be a party government; that is, it must be carried on by party,



and every citizen should be a party man, in such moderation as becomes one who holds that country is above party. I am sure, and I say it with pride, that there are many public men, and a great majority of citizens, who desire free and good government. I hope, also, that in what I have written I have not shown an inclination to cast blame upon either of the two great parties of the country more than upon the other. Both, in my opinion, have sinned, and sinned grievously. Yet, "why beholdest thou the mote that is in thy brother's eye, but considerest not the beam that is in thine own eye?" Nor would I advocate changes in our customs laws so great or sudden as to imperil existing establishments. Whenever the faith of the nation has been pledged to any class of citizens, whether they be producers or consumers, that faith should be kept inviolate. But I would return to a wise and equal policy just so soon as it could be done without a breach of faith. Let us reason together, Democrats and Republicans alike, public officers and private citizens, and consider seriously whither the affairs of the country are tending. Our people have yet to learn that if they would have good government they must look after it. There live in every country easy-going persons who like to have the work of governing done for them. Such persons have no place in a republic. *Eternal vigilance is the price of liberty.* That was the maxim of our fathers; why should it be forgotten by their sons? People who are always exclaiming that things will come right of themselves do not know what they are talking about. Things will not come right of themselves; nor will they come right because they ought to do so, nor ever without the aid of brave hearts and strong hands.

There is no occasion for dark forebodings. Let us believe in the efficiency and purity of republican government, as we may if the people will only manage it for themselves. What alone is wanting is public spirit, speaking through the laws, and exerting every social influence besides to make it shameful to do and suffer what is daily done and suffered before our eyes. Whenever an individual finds himself too feeble to act alone, let him persuade others to join him. Form societies to watch political methods and public servants; ferret out the

offenders, expose them, punish them. Nothing is necessary to the purification of our atmosphere but a little thunder and lightning from the real sovereigns of the country. Let us hope that the storm will not be long in coming.

And when it has come and passed away, we shall behold a giant nation, with unshackled limbs, reaching out both hands for free interchange with other nations of their products for ours. Then shall we see representatives and servants of the people, not putting to their fellow-citizens the insolent question how they voted at the last election, but attending to their own duties in enacting general and equal laws, and enforcing them without fear or favor.

## OFFICIAL NOMINATION AND COM- PULSORY ELECTION.

Address before the Massachusetts Reform Club, at Boston, March 7, 1890.

MR. PRESIDENT AND GENTLEMEN: Though I am a citizen of New York, I do not feel as if I were far from home when I stand on the soil of Massachusetts. Some of the earlier years of my life were passed in the old Commonwealth, and for many a glowing summer I have made my home in the Berkshire Hills. For this reason I am glad to be here. I am glad for another reason. Boston is a familiar name in the history of American self-government. Here if anywhere—here in this city full of the memories of heroic deeds and eloquent voices in defense of the right—here it is pleasant to discuss questions of public moment.

Many a year ago, in the stormy fight against human servitude, it was my good fortune to be listened to in Faneuil Hall, where Sumner and Wilson and Burlingame were among my auditors; and I account it an honor to be listened to now in the same city, though not in denunciation of human bondage, for that has vanished like the nightmare of an awful dream; but listened to in denunciation of that other bondage, hard enough to be borne, the subjection of our Government to corrupt and corrupting politics.

There are now, as I reckon them, six problems before the American people: honest government, woman suffrage, the treatment of the negro race, the rights of labor, the government of cities, and the government of corporations. The first of these problems is in our minds this evening. It is indeed first and foremost of them all—first in importance, and first in the minds of the people. Why is it that so much is said and written about ballot reform? Why is it that fraud has crept into the elections, and is cheating the people out of their right of self-government? You have lately enacted a law for protecting the secrecy of the ballot, and I am told that the



law works well. For this you are to be congratulated, not only for the good work done to yourselves, but for the good example to your sister States.

I will beg leave, however, to urge your going a step further. This is a party government, or, perhaps I should rather say, a government to be administered by party. You can not make it otherwise. In a free country party is indispensable, in order to avoid the distraction and disintegration consequent upon many candidates, many groups of electors, and many questions. In no other way can you concentrate the votes upon particular persons or particular measures. Our theory is that this is a government of the people—that is to say, a government resting upon all the people—not a part of them, not on aristocrats or kings, but on the whole body of citizens. The accustomed phrase, stamped as if it were a coin fresh from the popular mint, is that ours is a government of the people, by the people, and for the people. In sober earnest we must confess that this is no longer a government by the people and for the people. Its true designation would be a government of the people, run by politicians, caucuses, bosses, and cliques, for their own benefit. Ballot reform will go a great way to make it what the popular proverb would have it to be, but it will not go the whole way. What we are to aim at is to induce all the voters to take part in the administration of the government, for the equal benefit of all the people. How to do that is the question to which I ask your attention.

We will begin with these two postulates, that the collective will of the whole people is the only lawful source of authority in this country; and that this will is expressed not by the people in mass, but through delegates chosen by them. The choice of these delegates becomes thus of vital importance. In the making of the choice, two distinct processes are to be performed—one the setting up of the candidates, the other the final choice between them. We are busying ourselves at the present time with the second process, to the neglect almost entirely of the first. Now, of the two processes, the first is hardly less important than the second; for if honest and capable candidates are put in nomination, it matters less which are

elected, as in either case the community will be well served. The supreme problem, then, is to get the best candidates, and then to make all the people choose from among them. How will you get the best candidates?

Suppose an election in which only one office is to be filled, say that of mayor of this city. How can you secure nominations which best express the wishes of the majority of citizens in each party? You answer that the best way of getting at the wishes of the citizens is to ask them. Ask the Democrats whom they would nominate, and put the same question to the Republicans. You will then get the wishes of a majority of the Democrats as to their candidates, and of a majority of the Republicans as to theirs; and when the day of election comes, the majority of all the voters of the city will declare by their ballots which of the two candidates they prefer. A similar process would suffice when there are several offices to be filled.

How and when can the citizens be asked whom they would nominate? I answer that, wherever a registration is made for each election, the voters should be required to name their candidates when they register their own names as voters. That plan would answer for New York. In places where there are standing lists of voters, their preference of candidates to be nominated might be expressed in writing, and all the voters be called upon to give such an expression. The details need not be specified here; they could easily be worked out. If neither of these methods commends itself, as practicable and useful, then a written nomination, signed by a certain number of electors, say, for example, one tenth, should be sufficient warrant for printing the ballots and pursuing the system prescribed by present laws. This last is, I believe, the method adopted in some ballot reforms, but, for a nomination other than one made by caucus or convention, it may call out only a minority of voters, and leave the caucus in full force. At present the primary is the nominating unit, and a very bad one it is. It is for the most part unregulated by law, and is a hap-hazard affair. A caucus is called, and few or many—generally few—attend, and they nominate. The mass of the voters do not attend, and their voices are not heard. This meeting nominates

for the smaller local offices, and it sends delegates to the larger conventions for the nomination of candidates for the larger districts, and so on in a certain gradation, till you get to the nomination of a Governor and other State officers. My contention is that, instead of being made by these few, the nomination should be made by all the voters of the party residing in the district which the primary now assumes to represent, or as many of these voters as can be made to signify their wishes by their presence at a public meeting, or by writing under such safeguards as may be necessary to prevent fraud.

My suggestions, therefore, are these two—suggestions which I make with all proper deference to other views, but which I venture to press upon your attention. They are official nomination and compulsory election. I would make as many of the voters as possible take part in the nomination, and I would make all of them vote who are able to attend. Compulsory voting is not less necessary than compulsory education. The abstentions from the polls make a curious and instructive showing in our political history. It has been stated, in one of your journals, that in Springfield, out of the 8,699 legal voters recorded for 1884, only 6,960 were registered, and only 6,108 of those registered voted. Why was this? No doubt the principal reason was the disgust generally felt at the prevailing political methods.

Such, Mr. President and gentlemen, are my views of the reforms needed. I venture to commend them to your attention; and, if you find any good in them, I shall not have expressed them in vain, for the measures proposed would, I am fain to believe, fitly crown the edifice of electoral reform.





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